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Supreme Court of the United States.

OCTOBER TERM, 1906.

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No. 230

CHARLES E. YATES ET AL., PLAINTIFFS IN ERROR,

vs.

JONES NATIONAL BANK, DEFENDANT IN ERROR.

No. 231

CHARLES E YATES ET AL., PLAINTIFFS IN ERROR,

vs.

UTICA BANK, DEFENDANT IN ERROR.

No. 232

CHARLES E YATES ET AL., PLAINTIFFS IN ERROR,

vs.

THOMAS BAILEY, DEFENDANT IN ERROR.

No. 233

CHARLES E YATES ET AL., PLAINTIFFS IN ERROR,

vs.

BANK OF STAPLEHURST, DEFENDANT IN ERROR.

BRIEF FOR PLAINTIFFS IN ERROR OPPOSING MOTION TO DISMISS, AND REPLY TO DEFENDANT'S BRIEF.

J. W. DEWEESE,
FRANK E. BISHOP, AND
HALLECK F. ROSE,
Attorneys for Plaintiffs in Error.

JACOB NORTH & CO., PRINTERS, LINCOLN, NEB.

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BRIEF OF PLAINTIFFS IN ERROR OPPOSING MOTION TO DISMISS OR AFFIRM, AND REPLY TO DEFENDANT'S BRIEF ON THE MERITS.

I.

Statement.

On the eve of the hearing, defendants have moved to dismiss, or affirm, and have supported the motions with an

elaborate brief. We do not here attempt a re-statement of the case. In our brief on the merits, we have shown that the pleadings, evidence, and assignments of error were sufficient to refer to the state supreme court for decision the rights claimed by plaintiff in error under an act of Congress. We showed also that the state supreme court necessarily held, on the question of practice involved, that the proceedings taken by plaintiff in error were sufficient to raise the federal questions, and that they were definitely adjudicated adversely to the contention of plaintiffs in error. Our former brief, therefore, exhibits sufficient of the record to show that this court has jurisdiction to review the judgment on writ of error, pursuant to section 709, Revised Statutes of the United States, as that section is interpreted by this court. In the absence of any proceeding questioning the jurisdiction, the mere exhibition of the record was deemed sufficient. But since counsel now question the sufficiency of the record to raise the federal questions, we shall present the cases which definitely sustain the jurisdiction.

We shall not attempt the same latitude of inquiry covered by the brief in support of the motions; but shall disregard the authorities and suggestions in that brief directed to the points (1) that an order by a U. S. circuit court to remand a suit removed from a state court of *original* jurisdiction before trial is not reviewable, and (2) that to justify removal from the state court of *original* jurisdiction, because the suit involves a federal question, the presentation of such question must appear from the plaintiff's petition, and can not be aided by averments contained in the petition for removal or in the answer of defendant. Juris-

diction is here asserted only under section 709 Revised Statutes of the United States. The reasons for conferring jurisdiction upon this court to review *final judgments* of the state courts of last resort are widely divergent from those authorizing a removal or transfer from the courts of original jurisdiction before judgment. One statute confers appellate powers, and the other confers original powers. Generally, the state courts have concurrent jurisdiction with the federal courts to enforce rights arising under federal laws. The state courts are the forums most convenient to the parties, and acts of Congress confer on them exclusive original jurisdiction (except as otherwise specifically provided) in all cases where the amount in controversy does not exceed $2,000. It is presumed that the state courts in such cases will correctly interpret the federal statutes and enforce the rights claimed thereunder. So the policy of Congress has been to very greatly limit and restrain the right of removal, the mere transfer of controversies before trial, to the circuit courts of the United States. The national government having adopted that policy in respect to removal, the system of the federal judiciary would be wholly incomplete but for section 709 giving authority to this court to revise the *final judgments* rendered by the state courts denying rights asserted under authority of the government of the United States. It is by virtue of the jurisdiction to review and revise such judgments conferred by section 709 that the supremacy of the federal authority, declared by the constitution, can be maintained in such cases. It is under this latter authority alone that jurisdiction is here invoked. The other questions discussed by the briefs supporting the motion are purely academic and have no bearing upon the controversy,

except as the form of their presentation may be edifying to the members of the court and tend to display the learning of counsel. We shall limit our review of the cases to those which involve the one question of the power of this court to review *final judgments* rendered by the state courts of final authority.

II.

All that is necessary to sustain jurisdiction under the present writ is that the record show the federal right to have been claimed in the state court in such form as to refer it to that court for decision.

That the state court assumed the question to have been sufficiently raised, and actually decided it, is well-nigh, if not wholly, conclusive upon this court, of the fact that the federal right was sufficiently set up and claimed by plaintiffs in error in the state court.

The sole claim of jurisdiction, as above stated, is under what this court has repeatedly termed the *third clause* of section 709, Revised Statutes United States. That clause is as follows:

"A final judgment or decree in any suit in the highest court of the state . . . [third clause] where any title, right, privilege, or immunity is *claimed* under the constitution, or any treaty or statute, or commission held, or authority exercised under the United States, and the decision is against the title, right, privilege, or immunity specially set up *or claimed*, by either party, under such constitution, treaty, statute, commission, or authority, may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States."

Some of the earlier decisions gave undue prominence, and almost controlling force, to the words "specially set up," employed in the clause quoted. That construction, however, was obviously more narrow and strict than the terms employed in the entire section warranted. The precedent condition, which precedes the last quoted words, required only that the right, etc., be "claimed" under a statute of the United States, and that when the decision is against the privilege so "specially set up *or* claimed," the Supreme Court shall have power to re-examine, etc. Manifestly, the statute intends to confer jurisdiction to review such judgments in all cases where the right is actually claimed and denied by the judgment. By the precise terms of the statute, it is sufficient if the federal right is either "specially set up *or* claimed." For many years this court has followed the interpretation last suggested.

No particular form of words or phrases has ever been adjudged necessary in which the claim of federal rights must be asserted in the state court. It is sufficient if it appears from the record that such rights were either specially set up *or claimed* in such manner as to bring them to the attention of the state court and refer them to that court for decision.

California National Bank v. Kennedy, 167 U. S. 362–71, was a suit to enforce the liability of stockholders in a savings bank created by the laws of California. A national bank was alleged to be such stockholder and was adjudged liable, as such, by the state courts. The statement of the case prepared by Mr. Justice WHITE shows that the only averments in the answer claiming any right under the federal statute were:

"A demurrer to the amended complaint was overruled, and the California National Bank answered denying that it was ever the owner of any stock in the savings bank, and alleging that if any such stock was ever issued to it, it was issued without due authority from the bank in its corporate capacity and without authority of law. The answer also averred that the bank never acquired 'in the usual course of business or now has, as owner, any stock with the said defendant the California Savings Bank.'"

In holding this very general averment to be a sufficient foundation for the prosecution of a writ of error to review the question whether a national bank had, by the national banking act, power to hold stock in another corporation, Mr. Justice WHITE (*Ib.*) said:

"The answer averred that if any stock of the savings bank appeared to have been issued to the national bank, it was 'issued without authority of this corporation defendant and without authority of law.' In view of the fact that the defendant was a national bank deriving its powers from the Statutes of the United States, the averment that a particular transaction of the character of the one in question, if entered into, was without authority of law, can in reason be construed only to relate to the controlling and governing conduct of the corporation, that is, the law of the United States."

In recognizing the fact that the supreme court of the state had itself specifically decided the question, to be controlling, the opinion states (*Ib.*):

"The supreme court of the state interpreted the case brought to it from the court below as presenting the question of the power of the corporation under the law of the United States to become a stockholder in a savings bank, for in the opening sentence of its opinion it says: 'The California National Bank, one of the defendants, has ap-

pealed upon the ground that by virtue of the statutes under which it is organized, it had no power to become a stockholder in another corporation, and that its act in becoming such stockholder is so far *ultra vires* that it can not be made liable for any portion of the indebtedness of the corporation.'"

Missouri, K. & T. R. Co. v. Elliott, 184 U. S. 530–40, involved the question of whether the rule of the federal courts controlled the state court as to allowance of attorney's fees on an injunction bond given in the federal court, where the action for its breach is brought in a state court. In holding in favor of the right of this court to review the judgment of the state court, Mr. Justice WHITE in the opinion, said:

"But it is equally true that even although the allegations of federal right made in the state court were so general and ambiguous in their character that they would not in and of themselves necessitate the conclusion that a right of a federal nature was brought to the attention of the state court, yet if the state court in deciding the case has actually considered and determined a federal question, although arising on ambiguous averments, then, a federal controversy having been actually decided, the right of this court to review obtains. *F. G. Oxley Stave Co. v. Butler County*, 166 U. S. 648, 660. All that is essential is that the federal questions must be presented in the state court in such a manner as to bring them to the attention of that tribunal. *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226. And of course, where it is shown by the record that the state court considered and decided the federal question, the purpose of the statute is subserved. And so controlling as to the existence of the federal question is the fact that it was actually considered and decided by the state court, that it has been held, although the general rule is that the raising of a federal question in a petition for rehearing in the highest court of the state is too late, yet

when a question is thus raised, and it is actually considered and decided by the state court, the right to review exists. *Mallett v. North Carolina*, 181 U. S. 589, 592.

"Now, it plainly appears that the Kansas City court of appeals considered that there was presented to it for decision the question whether, in an action brought in a state court on an injunction bond given in a court of the United States, the state court was bound to apply to such a bond the rule prevailing in the courts of equity of the United States, *viz.*, that attorneys' fees are not a proper element of damages. We say this is undoubted, since the opinion of Kansas City court of appeals recites that such was the contention, and the court proceeded to consider and decide it. That this contention involved a claim of immunity under an authority exercised under the United States, reviewable in this court, we have recently decided in *Tullock v. Mulvane*, 184 U. S. 497. True it is that the Kansas City court of appeals held, contrary to the rule announced in the *Tullock Case*, that the state court was not bound to apply the rule of damages prevailing in the courts of the United States, and in effect while so concluding decided that the claim that the bond should be enforced according to the rule prevailing in the courts of the United States involved no federal question: but the fact that the state court, whilst deciding the federal question, erroneously held that it was not a federal one, does not take the case out of the rule that, where a federal question has been decided below, jurisdiction exists to review. The result of the contrary doctrine would be this, that no case where the question of federal right had been actually decided could be reviewed here if the state court, in passing upon the question, had also decided that it was non-federal in its character. The assertion that a federal right was not raised below is therefore without merit."

In *Swearingen v. St. Louis*, 185 U. S. 38–47, Mr. Justice PECKHAM, in an opinion denying jurisdiction upon the particular record, said (pp. 45–46):

"We do not hold that it was necessary to plead the claim in order to show it was specially set up, but it must have been so referred to and mentioned as to show that it was present in the minds of the parties claiming the right or must have been in some way presented to the court."

In *Home for Incurables v. New York*, 187 U. S. 155–58, Mr. Justice HARLAN, after quoting the opinion in *Parmalee v. Lawrence*, 11 Wall. 36, to the effect that the conflict between the state law and the Constitution of the United States must "appear in the pleadings of the suit, or from the evidence in the course of the trial, in the instructions asked for, or from exceptions taken to the ruling of the court," or "it must be that such a question was necessarily involved in the decision, and that the state court would not have given a judgment without deciding it," added:

"Later cases in this court have expressed the additional thought that if the highest court of the state assumes that the record sufficiently presents a question of federal right and decides against the person claiming such right, we will look no further, and will proceed to a consideration of that question, unless the decision is made to rest, in part, upon some ground of local law, sufficient enough in itself to sustain the judgment, independently of any question of federal right."

In *Mutual Life Ins. Co. v. McGrew*, 188 U. S. 308–9, the CHIEF JUSTICE, while denying jurisdiction upon the particular record presented, said in the opinion:

"If the highest court of a state entertains a petition for a rehearing, which raises federal questions, and decides them, that will be sufficient (*Mallett v. North Carolina*, 181 U. S. 589); or if the court decides a federal question which it assumes is distinctly presented to it in some way. *Home for Incurables v. New York*, 187 U. S. 155; *Swear-*

ingen v. St. Louis, 185 U. S. 46. Jurisdiction may be maintained where a definite issue as to the possession of the right is distinctly deducible from the record and necessarily disposed of, but this can not be made out by resort to judicial knowledge."

In *Green Bay & M. Canal Co. v. Patten Paper Co.*, 172 U. S. 58–82, Mr. Justice SHIRAS, expressing the opinion of the court in favor of jurisdiction on the particular record, said:

"But no particular form of words or phrases has ever been declared necessary in which the claim of federal rights must be asserted. It is sufficient if it appears from the record that such rights were specially set up or claimed in the state court in such manner as to bring it to the attention of that court. 'The true and rational rule,' this court said in *Bridge Proprietors v. Hoboken Land & Improv. Co.*, 1 Wall. 143, 'is that the court must be able to see clearly from the whole record that a certain provision of the Constitution or act of Congress was relied on by the party who brings the writ of error, and that the right thus claimed by him was denied.' . . . If it appear from the record by clear and necessary intendment that the federal question must have been directly involved, so that the state court could not have given judgment without deciding it, that will be sufficient."

In *Erie Railroad v. Purdy*, 185 U. S. 153, the opinion by Mr. Justice HARLAN, while denying jurisdiction upon the record before the court, said:

"So, if the highest court of the state, by its final judgment, sustains the validity of a state enactment drawn in question there as repugnant to the Constitution, treaties, or laws of the United States, or denies a right, privilege, or immunity specially set up or claimed in that court for the first time under the constitution or any treaty, statute,

or authority exercised under the United States, this court could review that judgment, *although no federal question was distinctly raised or insisted upon in the trial court.*"

In *Leigh v. Green*, 193 U. S. 85, Mr. Justice DAY in the opinion said:

"A motion is made to dismiss because the claim of impairment of a right secured by the fourteenth amendment was not made in the courts of Nebraska until the motion for rehearing was filed in the supreme court. We are unable to discover a specific claim of this character made prior to the motion for rehearing. In the motion reference is made to the failure of the Nebraska supreme court to decide the claim theretofore made that the statute of Nebraska was unconstitutional because of the alleged violation of the right to due process of law guaranteed by the 14th amendment to the Constitution of the United States. Be this as it may, the supreme court of Nebraska entertained the motion and decided the federal question raised against the contention of the plaintiff in error. In such case, the question is reviewable here, although first presented in the motion for a rehearing. *Mallett v. North Carolina*, 181 U. S. 589."

In *Carter v. Texas*, 177 U. S. 841, it was said in the opinion by Mr. Justice GRAY:

"But the question whether a right or privilege claimed under the constitution or laws of the United States was distinctly and sufficiently pleaded and brought to the notice of a state court is, itself, a federal question, in the decision of which this court, on writ of error, is not concluded by the view taken by the highest court of the state."

Among many other cases in which this court held jurisdiction under section 709, where the record showed the federal right to have been first set up in assignments of

error, after judgment had been rendered in the lower court, are *Meyer v. Richmond*, 172 U. S. 81–101 (per Mr. Justice McKenna), and *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226 (per Mr. Justice Harlan).

It is needless to extend the references. The cases above referred to destroy the argument against jurisdiction presented by the brief of defendants. Under the rule of these cases, it is entirely certain and obvious that the present record involves an interpretation and construction of an act of Congress, and that the final judgment in the highest court of the state was against the contention of plaintiffs in error upon the rights claimed thereunder. It is not disputed that the plaintiffs in error were, in doing the precise acts charged against them as the foundation of the action, officiating as directors of a national banking association, and were discharging duties specially enjoined, and exercising powers expressly conferred, by an act of Congress. The answers in the court of original jurisdiction so alleged; and defendants in error, in attempting to make out their cases in the trial court, adduced documentary proofs to establish this fact. Since the National Banking Association was the creature of the act of Congress, and since that act created the offices of directors and defined their powers, duties, and liabilities, the issues made by the pleadings and proofs involved, essentially and necessarily, a determination of whether the liabilities of plaintiffs in error were governed by the act of Congress. And this question, inherent in the character of the issues made by the pleadings and proofs, was distinctly and definitely adjudicated by the supreme court of Nebraska. That court assumed that the proceedings taken by plaintiffs in error

were sufficient, under the rules of procedure governing its own practice, to raise the federal questions and refer them to the court for its decision. So the state court definitely decided the federal questions here presented, and its Chief Justice, finding these questions not only to have been raised sufficiently and decided in the state court, but to have been well assigned in the proceedings taken for their review, himself allowed the writ of error upon which the case is now pending in this court. The record exhibiting the facts recited confers jurisdiction upon this court to review the judgment, under the doctrine of the cases above cited.

It further appears by the record that the *trial* court definitely passed upon all of the federal questions claimed by plaintiffs in error and presented by the assignments of error to this court. In our original brief, we quoted sufficient of the answer to show the federal rights to have been claimed in the pleadings. The trial court, by instruction 7 (printed record, p. 30) stated the elements of plaintiff's cause of action, upon which plaintiff had the burden of proof, as follows:

"In other words, the burden is upon the plaintiffs severally to show that the defendants severally published or caused to be published or participated in the publication of statements of the condition of the Capital National Bank, from time to time, during its existence, as by the plaintiffs severally alleged; to show that the plaintiffs, each for himself or itself, relied upon the truth of said statements of the condition of said bank, and to show that such statements were untrue, that is to say, that the bank was insolvent, or that its assets were not truly stated, or that its liabilities were understated to such degree and ex-

tent as to impair its solvency. Given. Defendants severally except. S. H. Sornberger, Judge."

The above instruction definitely and entirely excludes the element of *scienter*. It is needless upon this record to distinguish and refine as to the character of proof admissible to show the element of scienter—whether by direct proof of defendant's knowledge of the falsity of the statement, or by proof of circumstances showing that, in the ordinary and usual course of business, defendant ought to have known—whether this element must be established by proof of actual knowledge of the falsehoods, or may be sufficiently established by proof of wanton recklessness and heedlessness of whether the statement was true or false. This is so, because the trial court definitely and entirely excluded scienter from the enumerated elements of the cause of action. The above omission of scienter from the elements of the cause of action is emphasized by instruction 9 (printed record, pp. 30–31) quoted in our original brief, directing the jury that it was not material whether the director had knowledge that the report was false.

On the other hand, the present plaintiffs in error, Thompson, Yates, and Hamer, joined in a request to the court to give an instruction embodying the element of scienter. The record of this request (printed record, p. 39) is as follows:

"Instructions requested by defendants Thompson, Yates, Hamer, and Walsh . . . 6. The jury are instructed that if you find from the evidence introduced in reference to any of the directors named in any one of such cases that such director *did not knowingly* violate any of the requirements of the national banking act under which he was act-

ing as such director, or acted in good faith, trusting and confiding in the officers, agents of the bank, having no reason to suspect the integrity and honesty of any one of such officers and agents, then you are instructed that your verdict should be in favor of such defendant. Refused. Exception by J. W. Deweese for Walsh estate and the directors. S. H. Sornberger, Judge."

In the motion of Hamer's administratrix for a new trial (printed record, p. 45) and of Yates (printed record, p. 48) and of Thompson (printed record, p. 50) the 13th assignment directed to the trial court is: "The court erred in refusing to give instruction No. 6 requested by this defendant." Upon the foundation thus laid in the trial court, the petition in error of Mr. Thompson, addressed to the state supreme court (printed record, p. 7) contained the following assignment of error:

"7th. The court erred in refusing to give the sixth paragraph of the instructions requested by the defendant below, number 6th, wherein the duties and liabilities of directors of national banks was defined in accordance with the provisions of the national banking act."

Identical assignments are found in the petitions in error of Yates (printed record, p. 3) and of Hamer's administratrix (printed record, p. 5).

Again, the trial court, by instruction 16 (printed record, p. 33), defined and submitted to the jury the issue of negligence as follows:

"16th. You are instructed that proof that a president or cashier misappropriated or embezzled funds of the bank or falsified the books of account is not of itself sufficient to establish *actionable negligence against the directors* who

have not participated therein, but if such embezzlement, misappropriations, or falsifications are of such great extent and are of such long continuance as would have, upon reasonable examination, challenged the attention of an ordinarily prudent business man, then you would be justified in finding that the directors were charged with notice of such misappropriation or embezzlement and falsifications. Given. Defendants severally except. S. H. Sornberger, Judge."

In the separate motions for a new trial by Hamer's administratrix (printed record, p. 46), Yates (printed record, p. 49), and Thompson (printed record, p. 51) the forty-first assignment is: "The court erred in giving the 16th instruction on its own motion to the jury, numbered 16." And in the several petitions in error, the fifth assignment (printed record, pp. 2, 3, 5, 7) is as follows:

"5th. The court erred in giving to the jury the 16th paragraph of its charge to the jury, numbered 16, where he undertakes to define the actionable negligence of a director of the bank in not discovering the embezzlement of funds by the president of the bank or of the cashier, thus fixing a liability not recognized by the law, fixing and defining the duties of directors of national banks, and in direct violation of the principle and requirements specified in sections 5239, and other sections, of the national banking act."

Thus we have read from the record that the assertion of the federal rights was specially set up and claimed in the trial court (1) by answer, (2) by proofs, (3) by requested instructions, (4) by exceptions to instructions given, and (5) by assignments of error in the motion for a new trial. These claims, upon the foundations thus laid in the trial court, were specifically set up and claimed in the petitions

in error directed to the supreme court of the state. The judgment of the state supreme court necessarily decided them, and the court expressed its views upon them adversely to the contention of plaintiffs in error; and finally, the chief justice, recognizing such questions to be inherent in the record and judgment, allowed the writ of error. If, upon such a record, this court can not, upon a writ of error, review the judgment of the state supreme court upon these questions, it may as well relinquish all appellate powers attempted to be conferred by section 709 of the Revised Statutes, and announce that it is without authority to maintain the constitutional declaration that the constitution, and the laws of the United States made in pursuance thereof, are the supreme law of the land, and that the judges in every state are bound thereby. On the above references, the repeated assertions, in the brief supporting the motions to dismiss, that the federal rights involved were not claimed at every stage of the proceedings had in the state court, are shown to be entirely unfounded, if not indeed uncandid. There is, therefore, no merit in the contention that this court is without jurisdiction, and it is clearly the duty of the court to consider the causes upon their merits.

III.

The decision of the state court does not rest upon any ground of local law sufficient in itself to sustain the judgment independently of the federal rights asserted.

We have already shown that the instructions of the trial court definitely eliminated the element of scienter from the cause of action. The verdict was responsive to the in-

structions. It does not, therefore, include a finding that plaintiffs in error knew the reports to be false, nor that defendants made any of the statements recklessly and without any heed as to whether they were true or false. The findings of fact embodied in a general verdict and, implied from it, are to be deduced from the issues shown by the record to have been actually submitted for the finding of the jury. The record here not only shows a failure to submit the element of scienter, but that the jury was directed affirmatively that the fact of knowledge was immaterial. The federal right claimed was that the statute made scienter a necessary element of the cause of action. In the state supreme court, whose judgment is under review, the issue was squarely presented that the judgment below was erroneous because it excluded the element of scienter, claimed by plaintiffs in error to have been made a necessary ingredient of the cause by the act of Congress. In order to sustain the judgment, the supreme court necessarily held against the contention of plaintiff in error upon the federal right asserted. The decision does not rest upon any mere rule of local law sufficient in itself to sustain the judgment, exclusive of the federal right asserted. The exclusion of scienter is the exclusion of the federal right.

In order to suggest that there were frauds alleged against plaintiffs in error and proved at the trial, sufficient to support the judgment, that were wholly outside of their official acts of attesting the reports to the comptroller of the currency, counsel for defendants have mentioned three items: (1) a postal card message of the cashier found in the printed bill of exceptions at page 195; (2) a published business card run in a newspaper appearing

in bill of exceptions at page 25; and (3) the averments in the petition that defendants had conversations with the plaintiffs in error in which the latter represented that the bank "was thoroughly safe and sound," and that, for all that appears in the printed evidence, these averments of oral representations may have been sustained by the proofs.

Let us examine the *first* suggestion referred to, which is made in the brief supporting the motions to dismiss at pages 28 to 31. On January 17, 1893, according to the testimony of Jones, the credit balance of the Jones National with the Capital National was upwards of $17,000. On that day, Jones ordered a remittance from this balance of $5,000 to the Chemical National Bank of New York. The postal card referred to is an acknowledgment of the receipt of this order of transfer on a printed form in use by the Capital National Bank and a report of the remittance made. The card reached the postoffice at 1:30 A.M. January 17. We are told by counsel in the brief that the bank failed in fact on January 19. In the ordinary course of business by mail, the New York remittance made from Lincoln would not reach its destination, particularly if it went through the New York clearing house, until after the suspension of the remitting bank. The suspension found this item in transit. As is always true in cases of the failure of a financial or commercial concern, payment of the items in transit is suspended, and banks to which they are sent refuse to honor them, because of the failure of the drawers. The bank that makes the remittance, in the ordinary course, charges up the item at the time it goes forward. The bank who orders the remittance made, in this case the Jones National Bank, credits its correspondent bank with the item specifically ordered transmitted. When the draft

or remittance which was in transit in this case was dishonored, the item was subject to be credited back, on the books of the Capital National Bank, to the Jones National Bank; and properly chargeable on the books of the Jones National Bank to the Capital National. The Jones National Bank, in the ordinary course of business, had credited this item in transit to the Capital National Bank, reducing the balance shown on its own books to upwards of $12,000. The dishonoring of the item of $5,000 left the real indebtedness $5,000 more than was shown by the books. In order to establish the real amount of the indebtedness to be $5,000 more than was shown by the balances on its own books, the Jones National Bank produced the original card and offered proof that the $5,000 item was not credited to its account in New York. Nothing more than what we have already stated is involved in this item of proof. The postal card was not the source of any credit. There was no pretense at the trial that it was the source of any credit or that it, in fact, embodied any false statement. It evidenced a mere attempted withdrawal by the Jones National Bank of funds *already on deposit*. The card itself was signed by the cashier, and there is no pretense that any of the other plaintiffs in error had the slightest knowledge of this detail of business. The evidence affirmatively shows that Mr. Thompson was then absent from the city. The suggestion of counsel, in the connection made, is simply ludicrous and foolish. Its characterization as an act by which the bank, through the connivance of the directors, obtained the money of the Jones National, "in no real different manner than had a burglar entered the Jones Bank with jimmy and dynamite," is the wildest delirium of actual madness.

We turn now to the *second* circumstance, the business card which is mentioned in the more pretentious brief by counsel who discuss the merits. This business card (printed evidence, p. 25) reads as follows:

"Capital National Bank, Lincoln, Nebraska. Capital $300,000. C. W. Mosher, President. H. J. Walsh, Vice President. R. C. Outcalt, Cashier. Directors: W. W. Holmes, D. E. Thompson, C. W. Mosher, R. C. Phillips, E. P. Hamer, C. E. Yates, A. P. S. Stuart. Acc'ts. solicited. Banks, Bankers and Merchants."

This general card was found printed in a separate place in one of the daily papers that contained a publication of the report to the comptroller of the currency. Under what theory it was received in evidence we cannot devise; but the only mention of it during the proceedings was merely as an insinuation that persons reading the published report in the newspaper might, elsewhere in the same paper, find the names of all of the directors of the bank. The card itself contains no statement of the resources or liabilities of the bank. It gives no item whatever affecting the bank, except to *correctly* state the amount of its capital stock. It must have been an odd situation that induced counsel to suggest that this item furnished proof of *false representations*, sufficient to sustain the judgment, on grounds outside of the *official* acts of the plaintiffs in error.

The *third* and last circumstance suggested, also in the defendants' brief upon the merits, is the allegation in the petition that the plaintiffs in error made oral representations to the defendants, and that because the whole voluminous record, including examinations of accountants

extending over a period of some weeks, was not printed in full, the printed record does not definitely show that the oral averments were not established by proof. This suggestion, however, we anticipated. (See original brief of Mr. Thompson, pp. 9–10.) The testimony of the officers of the several banks who are plaintiffs, and to whom the oral representations are alleged to have been made, is printed, as is also the testimony of Thomas Bailey, the individual defendant in error. These are the only persons, upon the face of the averments, who could have been influenced by oral representations, and they each testify definitely and unequivocally that they had no source of knowledge other than the published reports. Their testimony, printed in the record, definitely excludes the possibility of their having been influenced by any oral statements, and definitely excludes the making of any oral statements. Having already covered the point, it will not be necessary to restate the evidence. It is disappointing to find in briefs exhibiting marked ability on the part of counsel the want of candor developed by the suggestions last considered. These unfounded suggestions point, as an index, to the desperate means employed to obtain the judgments. They exhibit more zeal than candor, and can only detract from the argument.

IV.

The state court, in determining the sufficiency of the petition, declined to recognize the established rule of pleading, invoked here by defendants, which requires a specific statement of each act of fraud or neglect relied on.

Generally, the rules of pleading in actions of this character, whether the petition charges fraud and deceit, or neglect and malfeasance in office, requires that the precise acts of the defendants creating the liability be definitely and particularly set out. If the action be for fraud and deceit, the precise statements of the fraudulent acts must be set forth; if for neglect and malfeasance, the particular act or omission of the individual defendant by which improper acts of the corporation have been caused or permitted, must be set forth. Failure to comply with this requirement is generally regarded as a defect in substance and not of mere form. Prior to rendition of the present judgment, the Nebraska supreme court had recognized and applied the rule of pleading mentioned, in actions of this character (*Arnold v. Baker*, 6 Neb. 135; *Aultman v. Steinan*, 8 Neb. 113; *Clark v. Dayton*, 6 Neb. 201; *Tepoel v. Saunders County National Bank*, 24 Neb. 817; *Staley v. Housel*, 35 Neb. 164; *Crosby v. Ritchey*, 47 Neb. 924; *Kansas & C. P. R. Co. v. Fitzgerald*, 33 Neb. 137; *Thomas v. Thomas*, 33 Neb. 373.)

The petitions in the present suits did not set forth or contain any particular representations alleged to have been made by Mr. Thompson, other than the report to the comptroller, of date December 28, 1886. Observance of the

above rule of pleading would necessarily have required a judgment on the pleadings and proof in favor of Mr. Thompson, because any cause of action upon the report of the year 1886 had long been barred by the statute of limitations when this suit was brought. Besides, on the theory of the petition, the report of 1886 had been superseded by new reports, made five times during each year, and the moneys originally deposited had been withdrawn long before the failure of the bank. The original report was not the source of any credit extended by plaintiffs to the Capital National Bank, represented by the deposits subsisting at date of suspension. Now the rule of pleading adverted to excluded all other statements mentioned in the petition, as other statements of like character, etc. The failure to plead the particular circumstances and to set forth the particular representations was, under that rule, a defect in substance and not in mere matters of form. The record shows that plaintiffs in error urged this rule of pleading against the sufficiency of the record of the trial court to sustain the judgment. The supreme court of Nebraska, in order to sustain the judgment below, was driven to the extremity of repudiating and denying the existence of the above stated rule of pleading which it had before enforced, in the long line of cases already cited. In this behalf, the court pursued precisely the same course as that pursued in respect to the element of *scienter*, which was not established by the proofs. Finding that a scienter was not shown, and that the directors, other than the managing officers, had acted in good faith without knowledge of falsifications, the Nebraska court, in order to sustain the judgment against the *innocent* directors of a national bank, definitely repudiated the well-established doctrine of the

common law and held that a scienter did not need to be proved. We now adduce the record proof that the Nebraska supreme court pursued the course above ascribed to it. In the written opinion delivered in this case (printed record, p. 93) the court, defining the elements of the cause of action, say:

"It was incumbent on the plaintiffs to establish by a preponderance of the evidence, (1) that the defendants *published* the statements purporting to show the financial condition of the Capital National Bank *or participated* in the publication thereof; (2) that such statements were false; (3) that the plaintiffs severally relied upon said statements and believed them to be true, and were thereby misled to their injury."

The above definition of the elements of the cause of action definitely and entirely excludes scienter. The court determined that it was not necessary to offer proof that the directors had knowledge of the falsifications in the statements, or to show that they participated in their making or publication, in wanton recklessness or heedlessness of whether the statements were true or false. Elsewhere (p. 94) the court employed the language, many times already quoted in briefs of both sides: "We do not wish to be understood to say that all of the defendants knew that such statements were false; we are satisfied that such is not the case."

To the point that the Nebraska supreme court repudiated the general rule of pleading that failure to specifically set forth the allegations or wrongful acts relied on, is a defect of substance and not of form, we quote from the same opinion (printed record, p. 94) as follows:

"The defendants appear to take the position that plaintiffs should be restricted to the two reports set out at length. We do not think so. The allegations of the petitions are sufficiently broad to admit proof of any and all statements made on and between the dates just mentioned. If definiteness and certainty required all such statements to be set out at length, *the remedy was by motion.*"

So the suggestion found in counsel's brief on the merits at pages 66 and 67, that specifications of the particular acts, in cases of this character, are required by correct rules of pleading in stating a cause of action for mismanagement and neglect, merely exhibits counsel's fine sense of irony. That such rule of pleading was recognized at the circuit in the district of Massachusetts in *Allen v. Luke*, 141 Fed. 694–97, is not material in this case. Upon mere questions of practice, the state court has final, and in this case has exercised, arbitrary authority. Its own holding in the opinion in the present suit that the want of specification in the pleadings is a mere matter of form, which can be availed of *only* by motion, is final and binding upon this court. On the present hearing, this court must test the sufficiency of the petition to raise the federal issue without regard to the rule of pleading which the opinion of the state court repudiates. Since the state court denied to plaintiffs in error the benefit of this rule, in order to affirm a judgment against them, the defendants can not be permitted to here urge, in their own behalf, the benefit of that same rule, which, if applied below, would have overturned the judgment in their favor.

V.

The element of scienter was definitely and entirely excluded by the Nebraska supreme court.

We shall now consider briefly the argument of defendants on the merits. We had not expected counsel to claim that the record, in any particular, showed the judgment to rest upon a finding that the plaintiffs in error, other than the president and cashier who were the managing officers of the bank, had any knowledge that any falsifications appeared in any of the reports, nor that any of the plaintiffs in error, other than such managing officers, participated in making or publishing any of the reports, in a manner exhibiting wanton recklessness or heedlessness of whether the financial statements were true or false. But since such assertion is found in the brief, we shall proceed to show definitely and certainly, by appropriate record references, that it is both unfounded and uncandid. At the threshold of this inquiry, we shall exhibit the theory of the liability of plaintiffs in error, as embodied in the instructions of the trial court to the jury. At request of the plaintiffs below (defendants here) the trial court gave two instructions, the record of which (printed record, p. 34) is as follows:

"1st. A director or executive officer of a national bank is responsible for the making and publication of a false report of its financial condition, though he did not personally make and publish such statement, if he in any manner participated in the making or publication thereof. A director of a national bank is presumed to know its true condition and that the law requires true statements of its affairs to be made and published by the bank from time to

time, and if one has been a director or executive officer of such a bank for a long period of time he is presumed to have a knowledge of the making and publishing of the statements of its condition, and the burden is cast upon him to overcome this presumption by competent evidence."

"2d. The jury are instructed that inasmuch as the law required that all reports made by a national bank to the comptroller of the currency shall be published *at the expense of the bank*, in a newspaper at the place where the bank is established, you have a right to consider such published report as having been introduced in evidence in this action purporting to have been signed, and whose name appears in such published reports, as having [been] authorized by such defendants, so appearing to have signed the same. Requested by plaintiffs. Given."

Instructions 10, 11, 12 and 13 of those given to the jury by the trial judge of his own motion (printed record, p. 31) are as follows:

"10th. The director of a bank who *publishes*, or *participates in the publication* of, a report of its condition, by such acts asserts that the statements contained in such report are substantially true, and he can not rely upon his ignorance of the true condition of the bank as a defense to an action, when he in such published report represents the bank to be solvent, if in truth it is not solvent and its assets are fictitious or worthless, or its liabilities so much greater than its assets as to render the bank insolvent."

"11th. It is not alleged by the plaintiffs and the proof does not indicate that all of the officers and directors of the Capital National Bank signed any one of the alleged public statements of the condition of the bank; it being required of the bank and its officers and directors that such statements should be verified by the oath of the president or the cashier, and attested by at least three of the board of directors; consequently it was not necessary in any one re-

port for each or all of the directors and officers of the bank either to sign or verify such published statement. And in the particular case of the defendant H. J. Walsh, who was, as before stated to you, vice-president of said bank, it is not in evidence that at any time he signed his name to any of the published statements aforesaid.

"It is alleged in the several petitions, however, that each and all of said defendants at divers and sundry times, either as officers or directors, made out, signed and published, or caused to be made out, signed and published, the statements in question.

"You are instructed in that behalf that it is not necessary in order to create a liability of any of the defendants, for the plaintiffs to show that any such director or officer actually with his own hand signed and caused to be published the statements alleged to have been published. It is sufficient if the plaintiffs have shown that such officer or director *participated* in making and publishing the said statements."

"12th. In determining whether or not the defendant directors or officers did in fact *participate* in any or all of the statements alleged, or shown to have been put forth and published, besides considering any testimony, if any, which goes directly to show that such director or officer personally signed the same, you are at liberty to take into consideration the length of time such officer or director had been in the service of the bank in such capacity at the time of any particular publication, the opportunities which he had for knowing the course of events in the bank, and of knowing that the bank officers and directors were issuing statements of the condition of the bank and causing the same to be published in the public newspapers, and consider from all these facts and circumstances taken together with all the other testimony touching upon the same, whether or not he in fact participated in and assented to the issuance and publication of such statements."

"13th. And although you should find from the testimony that any particular director or officer of said bank did not himself directly cause to be issued and published the statements concerning the condition of said bank, yet

if you should find that at the time such statements were being published in the public press, such director or officer was a resident of the city of Lincoln, was in a condition of health to be about giving his ordinary attention to business, and was not absent from home, that is, absent from the city of Lincoln, such facts should be taken into consideration by you, together with the other evidence and circumstances in the case in determining whether or not that officer or director knew of and participated in the issuance and publication of any or all of the statements of the condition of said bank."

In the face of this record, it required some hardihood on the part of counsel to assert that the plaintiffs in error, other than the managing officers of the bank, were held liable by the proceedings in the state court only because of having certified as absolutely true, of their own knowledge, the truth of the statements made to the comptroller of the currency. By each one of the above quoted instructions, the trial court definitely eliminated the requirement that any of the directors should have actually signed or attested the statements. The fact definitely stated to constitute the director's liability was merely that he should have "participated in the publication of a report," although it may have been signed and verified by others and did not bear his name. That proposition is embodied in the tenth instruction quoted. In the eleventh instruction quoted, the jury was told that it was not necessary for plaintiffs to show that any such director either signed the report or caused it to be published. Participation, presumed from the holding of the office, was all that was required. By the twelfth instruction quoted, the jury was given liberty to determine the fact of any participation in publishing such reports from a consideration of the length of service of the

officer, and his opportunity for knowing that such statements were made and published. By the 13th instruction quoted, the jury was directed that if "any particular director or officer of said bank did not himself directly cause to be issued and published the statements," etc., yet the jury might still inquire whether, when the statement was published, the director was a resident of the city of Lincoln and in a condition of health to attend to business, and use such facts to determine against the director the issue of whether the "director knew of and participated in the issuance and publication of any or all of the statements of the condition of the bank." By the first instruction given at request of plaintiffs below, above quoted, the jury was directed that a director "is responsible for the making and publication of a false report of its financial condition, tho he did not personally make and publish such statement, if he in any manner participated in the making or publication thereof." This language was followed in the same instruction by the direction, "If one has been a director or executive officer of such a bank for a long period of time, he is presumed to have a knowledge of the making and publishing of the statements of its condition, and the burden is cast upon him to overcome this presumption by competent evidence." The fact of actual attestation is everywhere definitely excluded as a ground of liability.

The proofs were that Dr. Hamer attested but a single report of date September 25, 1891, and that Mr. Thompson attested but one of the reports set out in the petition, dated in 1886, and but three others, which dated back many years before the failure of the bank. In the long term of service of these officers extending over a period of some nine years one of them attested a solitary report and the other four

reports, averaging one report in a period of more than two years. The law required the making of at least five such reports to the comptroller during each year. H. T. Jones, testifying as the managing officer of his bank, said he received the reports "as soon as published and the mails would arrive here from Lincoln" (printed evidence, p. 193). Without here giving references, the testimony of the other plaintiffs was to the same effect. So these plaintiffs, who kept their eyes trained on the official reports as they were issued from time to time, scrutinizing them as soon as they fell from the press, and who based their future dealings upon the condition of the bank shown by each new report, must have taken notice of any changed conditions shown therein. Each published report supersedes the prior reports. Not one of the plaintiffs claims that, in determining whether he should continue his deposit in the Capital National Bank, he looked to the antecedent reports. The proof is to the contrary. It was necessary in order to justify recovery to hold the present plaintiffs in error responsible for reports not attested by them and in the making of which they did not participate. It was further necessary, in submitting the case to the jury, to so define the rules of liability as to exclude any requirement to prove that the plaintiffs in error, who had not executed the later reports, had knowledge of any falsifications contained therein. By the testimony, if credit is given to the zealous statements of interested witnesses, the latest report, as it arrived, was the source of continuing credit, and necessarily the last report must have been the source of the credit evidenced by deposits subsisting at time of suspension. To meet these difficulties in the way of plaintiffs below, the jury was directed that a "participation" in the *publication*

of the report was sufficient to hold the non-attesting directors responsible. To make a finding by the jury of such *participation in the publication probable,* the plaintiff offered the *second* instruction above quoted, informing them that the banking act required that the reports made to the comptroller of the currency "shall be published at the expense of the bank." So it is simply untrue to state that the record shows any of the plaintiffs in error to have been held liable on the theory that any specific report, actually attested by him, was the means of deceiving the defendant in error into extending the particular credit evidenced by the deposit subsisting when the bank failed. The record references given to the instructions show the fact to be directly to the contrary. The entire argument, presented here by the brief of defendants, rests upon false premises and patent misinterpretations of the record.

Having thus recalled the particular issues raised by the record, and shown that the argument of defendant is based upon a false assertion as to the character of the issues and the rules of liability applied by the trial judge, and approved by the supreme court of the state, we shall now show that the state court did not rule in harmony with the theory that a scienter might be proved in the manner suggested in defendant's brief, and that it did not purpose or intend so to do. The holding of the state supreme court is directly to the contrary, that proof of a scienter need not be made in any form or manner. The Nebraska court held flatly that proof of guilty knowledge or wilful participation in the wrong, or any recognized equivalent of direct proof of that element which we term scienter, is not required in that state to make out a cause of action for fraud or deceit. This assertion can not be the subject of reason-

able or fair disputation, if tested alone by the present record.

The language of the state supreme court's opinion, already quoted, which defines the elements of the cause of action (printed record, p. 393) definitely excused the defendants in error from proving that plaintiffs in error had knowledge of any falsifications in the reports, or knowingly participated in any fraud, or proving any recognized equivalent of such facts. The opinion held, as already pointed out, that the plaintiffs in error did not know the statements to be false. In this respect, the holding of the supreme court was merely an approval of instruction 7 (printed record, p. 30) which also excused plaintiffs below from proving the same facts; and of instructions 10, 11, 12 and 13 given by the court on its own motion, and instructions 1 and 2 given at request of plaintiffs below (printed record, pp. 31, 32, 34), all of which in terms restricted the burden of proof, upon this element, to mere proof of participation in the publication of reports. In reaching the conclusion that the cause of action did not embody the element of *scienter*, the opinion of the supreme court, as already pointed out, referred to and followed the prior holding in *Gerner v. Mosher*, 58 Neb. 135–60, which flatly held that proof of a scienter, in any form, was not essential and was wholly immaterial.

But defendants in their brief urge (pp. 37–38) that the employment of the term *scienter* in the opinion that case, "was a mere obiter;" and that the doctrine at the foundation of that decision is consistent with the general rule requiring guilty knowledge and participation in the fraud, or its legal equivalent, to be alleged and proved. To support this position, reference is made to the article of Prof.

Lee in 20 Cyc. 26. In the footnote, from which defendant quotes, Prof. Lee, in the article referred to, gives the following exposition of the isolated holdings of the Nebraska court:

"In Nebraska it has frequently been said to be the settled law of the state that if the representation is false, and is relied upon by the plaintiff to his injury, defendant's knowledge of the falsity is immaterial and need not be proved, the courts apparently considering that the rule requiring a scienter to be shown was not in force there. And this statement of the law was deemed applicable, of course, whether the fraud was made the basis of an action or was set up by way of recoupment or counterclaim in an action to enforce a contract." (Citing the cases, including *Gerner v. Mosher*, 58 Neb. 135.)

The note then proceeds (20 Cyc. 26):

"It is doubtful, however, whether the court intended entirely to abrogate or disregard the rule requiring a scienter."

It then contains the excerpt quoted by defendants, suggesting a means of reconciling *Nebraska's discordant cases* with the general rule asserted in the text, citing the minority opinion by IRVINE, C., in *Gerner's case*, and the original Nebraska case of *Phillips v. Jones*, 12 Neb. 213, and concludes: "If this explanation is correct, the Nebraska decisions are not inconsistent with the rules of the text." Let us then determine the question by further reference to the decision of *Gerner v. Mosher* (58 Neb. 135), referred to and followed in the opinion in the case under review.

In *Gerner v. Mosher*, 58 Neb. 149, Commissioner IRVINE said:

"It is true that it has been frequently held in this court that in an action for false representations it is not necessary to aver or prove a scienter. . . . But it does not follow that one making a statement is charged absolutely with the consequences of its falsity in fact, regardless of the form of the statement and the circumstances under which it is made. Indeed, in the cases cited, the language used in one and implied in the other, is that one is liable for the consequences of the false statement only when it is made as a positive representation of an existing fact. In *Moore v. Scott*, the statement was qualified by the persons making the representation giving the source of his information as 'a reliable person' and stating his belief on that ground, and it was held that he was not responsible thereby for the truth of the ultimate statement, but only for the truth of his receiving such information from a reliable person. . . . Following the case cited (*Briggs v. Spaulding*, 141 U. S. 132), the circuit court for the northern district of New York has held that where the affairs of the bank were managed solely by the cashier, who was reputed and universally believed to be honest and capable, directors who knew little of the business of banking were not guilty of negligence because they failed to examine the books, there being no grounds of suspicion known to them (*Warner v. Penoyer*, 82 Fed. Rep. 181). This being the rule of duty imposed on national bank directors, we think it follows that where a director attests a report he does so as a director and with a view only to such knowledge of the condition of the bank as the exercise of his duties as a director imposes upon him."

Commissioner IRVINE, from whose opinion we have quoted, was not a member of the Nebraska supreme court. By the Nebraska constitution, that court is composed of three judges, of which the member whose term of service first expires is the Chief Justice. The duties of Commissioners, appointed to relieve an overcrowded docket, were *advisory* only. At page 149 (*ib.*) IRVINE, C., pointed out

that the court was against this view, which was concurred in only by his fellow-commissioner RYAN. The authoritative opinion of the court, delivered by NORVAL, J. (*ib.* 152), opens with the statement that the court does not concur in the proposition expressed by IRVINE, C., which we have already quoted. While numerous authorities are referred to and reviewed, in the opinion of the court upon this narrow question, by NORVAL, J., the gist of the holding is comprehended in the following paragraph (*ib.* 156):

"In our view, whether the attesting directors possessed knowledge of the falsity of their reports is wholly immaterial. They were in fact false and untrue, and those who deposited money with the bank or who purchased stock of the corporation in reliance upon the truthfulness of the contents of these reports *were as much deceived and damaged thereby as though the directors when they signed the reports knew them to be false.* That they were innocent of the true situation or condition of the affairs of the bank is wholly an unimportant consideration, since proof of a *scienter* is not necessary to a recovery. This court has frequently asserted that to maintain an action for false representations it is not essential that it be shown that they were intentionally or knowingly made by the defendant. This is the rule in ordinary causes, and no valid reason can be suggested or pointed out why the same principle should not apply in actions for deceit against the directors of a banking corporation. Certainly no case has come under our observation which has made an exception in their favor."

In the views expressed in the foregoing paragraph, all the judges concurred (*ib.* 160). That doctrine was therefore unanimously adopted by the court. The ground upon which *scienter* was excluded was that the consequences to the plaintiff were the same, in cases where the defendant

acted honestly, as in those cases where his conduct had been fraudulent. To quote the language of NORVAL, J., defendant was "as much deceived and damaged thereby as though the directors when they signed the reports knew them to be false."

Having held briefs in the *Gerner's case*, we are familiar with the pleadings. The report of that case (58 Neb. 139) shows that each count in the petition depended upon the making of a single specific statement, which was set out in full. In that suit, plaintiff complied with the general rule of pleading which the state court in this suit repudiated. Plaintiff there relied upon the last published report preceding his purchase of stock of the bank. The judgment there entered was a dismissal as to the directors occupying the relation to the reports relied on which is occupied in this case by plaintiffs in error, Hamer and Thompson. There was a singleness and directness of issue presented in *Gerner's case* which is entirely wanting here. Here the doctrine of *Gerner's case* has been expanded so as to condemn directors in a situation which required their dismissal, under the holding in *Gerner's case*.

VI.

Section 5239. Revised Statutes of the United States, prescribes the civil liabilities enforcible against national bank directors for official acts done contrary to the requirements of the national banking act.

The legal issue, whether section 5239 prescribes the civil liabilities incurred by directors because of official acts done contrary to the requirements of the national banking act, is definitely raised by the record. The antecedent refer-

ences establish that such issue was raised. The rule of liability created by the section referred to, as claimed by the plaintiffs in error, was denied by the highest court of the state. The record refers that question to this court for decision. In deciding that question, the mere form of the remedy available is not a material consideration. It may be conceded that the liability imposed by the statute is enforcible in a common law action of deceit. It may further be conceded that in the forum selected in the present suits the local interpretation of the common law excludes the element of the directors' *knowledge*. But existing rules of the common law do not restrain the powers of Congress. When legislating in respect to official acts of the officers of an institution of its own creation, Congress had power to change the substantive rules of liability recognized by the common law, and to write into the ancient cause of action for deceit the element of *scienter* requiring proof of the director's knowledge and wilful participation. The legal issue here raised pertains to the substantive law defining liability which must control the decision, whatever remedy may be available for enforcement of that liability. This review of the record leads back to the propositions discussed in the original briefs of plaintiffs in error. The superficial and insinuating suggestions made in the brief of defendants have been dissipated by the light which the record itself reflects, and the points originally discussed are again exposed for the court's determination.

In determining the issue touching the application, interpretation, and controlling force of the act of Congress, we do not regard the present interpretations of the rules of the common law governing actions of deceit as important.

The vital consideration is as to whether the federal statutes apply. If section 5239 (Rev. St. U. S.) applies and governs and controls the liabilities of the plaintiffs in error, it must be conceded on the face of the record that no rational interpretation of the language of that section will permit the judgments to stand. In our original brief we referred to the rule of the common law, in force at passage of the national banking act, merely as an aid to interpretation of the language used in section 5239. Prior to passage of the national banking act, this court in *Lord v. Goddard*, 13 How. 211, distinctly held that the action of deceit could not be sustained "without proving actual fraud in the defendant, or an *intention to deceive* the plaintiff by false representations;" and further that, "the simple fact of making representations which turned out not to be true, *unconnected with a fraudulent design*, is not sufficient." It was, therefore, to be expected that Congress, in establishing civil liabilities against the directors of these associations of its own creation, should preserve the elements of knowledge and wilful participation in the wrongs made the basis of the cause of action. This court is at liberty to alter its expressed interpretations of the common law rules, but is without power to amend a statute or erase from it unambiguous words controlling its interpretation. A statute, once enacted, retains its force till modified or repealed by Congress.

We note, however, that a large proportion of the references given by defendant are quotations of inflammatory rhetoric employed by *nisi prius* judges, whose utterances are not authoritative, either to establish or declare the rule of the forum. The cases referred to may, as a class, be said to be exceptions to the rule generally recognized, and

are in direct conflict with the rule of this court established in *Lord v. Goddard*, 13 How. 211, and since adhered to, preserving the element of *scienter* in actions of this character. The text writers recognize the Nebraska cases as discordant and out of harmony with the general rule applied by the courts employing the English language. It would be easy to overcome the references found in the brief of defendants by collating and reviewing the decisions supporting the generally recognized rule, without going outside of the cases cited by Prof. LEE in his article on *fraud* (20 Cyc. 24, etc.), to which both parties to this suit have made reference. But since the reliance of plaintiffs in error is upon the *statute*, such course would merely cumber the argument. We shall, therefore, hold to the argument based upon the federal statute.

A most superficial and shallow argument offered by defendants against the application to the case of section 5239 (brief, pp. 48–49) is that neither the making of false official reports to the comptroller, nor the publication of false official reports violates any provision of the national banking act. Therefore, counsel argue, since the liabilities imposed by section 5239 are consequent upon acts violative of some provisions of the title, it is not applicable to a cause founded upon the making of false official reports to the comptroller. That suggestion is strikingly discordant and inconsistent with the interpretation of the national banking act held by the state court, of which defendants had the benefit at the trial. The trial judge, *at defendant's request* (instruction 1 requested by plaintiffs below, printed record, p. 34) directed the jury that, "a director of a national bank is presumed to know . . . that the law requires true statements of its affairs to be made and

published from time to time." Having contended for and procured such interpretation to be given by the trial judge to the jury, it would seem that defendants should hardly be permitted to urge the contrary view at this time. However, the instruction quoted seemed to follow closely, and almost literally, the interpretation placed by this court on section 5211 in *Cochran v. U. S.*, 157 U. S. 286, holding that the duty of making and publishing the report is imposed upon the association itself. Section 5211 enacts that "every association shall make to the comptroller of the currency not less than five reports during each year . . . verified by the oath or affirmation of the president or cashier of such association and attested by the signature of at least three of the directors." Elsewhere in the brief, defendants contend for a very rigid interpretation of the provisions requiring the association to verify its reports as true.

The above provisions requiring the making of true reports by the association, verified as such in the manner prescribed, is supplemented by the additional provisions contained in sections 5209, making it an offense punishable by imprisonment from five to ten years to make any *false entry* in such report. Criminal liability for falsifying the report, contrary to the requirements of section 5211, is by section 5209 visited only upon the person actually making the false entry. Civil liability against the director, who knowingly participates in or assents to the falsification, as contradistinguished from the *act* of making the falsification, is imposed by section 5239. The act is thus complete and harmonious as a whole, and creates and defines the liabilities, both criminal and civil, resulting from the felonious making of the falsifications, or knowingly or wil-

fully permitting them to be made. In urging this interpretation we are by no means taking the initiative. Such is the interpretation long since placed by this court upon these various provisions of the national banking act. The following cases definitely settle this question of interpretation.

In *Cochran v. U. S.*, 157 U. S. 293, it was said in the opinion by Mr. Justice BROWN (in our first brief accredited through error to Mr. Justice WHITE):

"The argument of defendants assumes that the making of the entry and the making of the report are the same thing, whereas, in fact, they are wholly different. By section 5211, the report must be made by the *association*, and must be verified by oath or affirmation of the president or cashier and attested by the signature of at least three of the directors. But under section 5209, there is no penalty affixed to the association or its officers for making a false report, nor to the president or cashier for verifying such report. The penalty imposed by section 5209 is affixed to the one who makes any false entry in any book, report, or statement of the association; and that penalty is applicable to any officer or agent of the bank who actually makes the entry with intent to injure or defraud, or to deceive any agent appointed to examine the affairs of any such association."

The case quoted from holds merely that section 5209, prescribing criminal punishments, does not cover mere acts of verifying the published reports which are false, in contravention of the requirements of section 5211 that the reports made shall be verified as true and then attested by three directors. The penalties attaching to the directors for knowingly permitting the verification of reports which are, in fact, false, are prescribed by section 5239, and are civil liabilities, and not criminal punishments. In the

opinion of Mr. Justice BROWN quoted, reference is made to the opinion of Mr. Justice WOODS in *U. S. v. Britton*, 107 U. S. 655–70, which considers the several sections of the national banking act and interprets them together, and definitely explains the force and operation of section 5239.

In *U. S. v. Britton*, 107 U. S. 667–68, Mr. Justice WOODS, in the opinion, reviewing and interpreting the provisions of the national banking act under consideration, said:

"The counts, therefore, charge maladministration of the affairs of the bank, rather than criminal misapplication of its funds. If we hold these counts to be good, then every official act of any officer, clerk, or agent of a banking association, by which its funds are applied in a way not authorized by law, would be punishable under section 5209. For instance, section 5200 of the Revised Statutes declares that 'the total liabilities to any association of any person, . . . for money borrowed, . . . shall at no time exceed one-tenth part of the capital stock of the association actually paid in.' Section 5201 provides that no association shall make any loan or discount on the security of the shares of its own capital stock, unless such security shall be necessary to prevent loss on a previously contracted debt. If the counts under consideration are sustained, then every president, director, cashier, teller, clerk or agent of a banking association who has any part in lending the money of the association contrary to the provisions of these sections, is guilty of a criminal misapplication of its funds.

"So, by section 5137 of the Revised Statutes, the purposes for which a banking association may purchase and hold real estate are limited and specifically pointed out. If the directors of a banking association should authorize the purchase of a piece of real estate for its use, but not for purposes authorized by the statute (even though with intent to injure some corporate body or natural person), it could hardly be claimed that the directors who made the order, and the other officers or agents of the association who (with a like intent) had any hand in making the purchase or in

paying out the money of the bank therefor, would be liable to indictment and imprisonment under section 5209.

"The acts charged by the counts under consideration are precisely of the same character as those just mentioned. They are acts of maladministration of the affairs of the association by its officers. The penalty for such acts is prescribed by section 5329, which declares: 'If the directors of any national banking association shall knowingly violate, or knowingly permit any of the officers, agents, or servants of the association to violate any of the provisions of this title (national banks), all the rights, privileges, and franchises of the association shall be thereby forfeited. . . . And in case of such violation, every director who participated in or assented to the same shall be held liable, in his personal and individual capacity, for all damages which the association, its shareholders, or any other person shall have sustained in consequence of such violation.'

"We are, therefore, of the opinion that the wilful misapplication of the moneys and funds of the banking association, which is made an offense by section 5209, means something different from the acts of official maladministration referred to in section 5239, and it must be a wilful misapplication for the use or benefit of the party charged, or of some person or company other than the association, with intent to injure and defraud the association or some other body corporate or some natural person."

It, therefore, appears to be settled by the definite interpretations found in the decisions of this court, above quoted, that it is the office of section 5239 of the Revised Statutes to prescribe civil penalties against the directors for acts which are violative of any of the provisions of that title, and that where criminal punishments are not elsewhere prescribed, section 5239 necessarily prescribes the only liability imposed upon the directors for official misconduct amounting to violations of any provisions of the title. The decisions referred to definitely and fully sustain the argument presented in the original briefs, that to entitle a

depositor in the association to recover in this case against the directors, other than those who actually made the false entries in the reports, the depositor must show that the director did the act knowingly or knowingly permitted the falsifications to be made. To sustain the judgment, the record should show that the trial court, by appropriate instructions, imposed this burden upon the depositor. Since the record in the present case shows to the contrary, the judgments must be reversed.

The present suit involves questions touching the powers, duties, and liabilities of directors in a corporation created by an act of Congress (per SWAYNE, Justice, *Bank v. Dearing*, 91 U. S. 33), "to aid the government in the administration of an important branch of the public service." And "being such means," says Mr. Justice SWAYNE, "brought into existence for this purpose, and intended to be so employed, the states can exercise no control over them, except in so far as Congress may see proper to permit. Anything beyond this is 'an abuse, because it is the usurpation of power which a single state cannot give.'"

In *California National Bank v. Kennedy*, 167 U. S. 366, 367, it was said by Mr. Justice WHITE:

"It is settled that the United States statutes relative to national banks constitute the measure of authority of such corporations, and that they can not rightfully exercise any powers except those expressly granted or which are incidental to carrying on the business for which they are established. *Logan Co. Nat. Bank v. Townsend*, 139 U. S. 67, 73. . . . It is clear, however, that a national bank does not possess the power to deal in stocks. The prohibition is implied from the failure to grant the power. *First National Bank v. National Exch. Bank*, 92 U. S. 128."

Congress imposed on the association by a mandatory statute the duty of making the reports to the comptroller of the currency, and of verifying them, in the manner stated, *first*, by the oath of a managing officer, and, *second*, by attestation of three of the directors. As the trial court instructed the jury, this statute required the making of *true* reports. Having imposed these official duties, the statute, by section 5239, very properly described the penalties, in form of civil liabilities, consequent upon their violation. The application of the statute seems hardly a debatable question. Counsel who characterize this as a "novel theory" must be so provincial as not to appreciate the functions and powers of the national government.

In this connection, we disavow any imputed claim that the validity of ordinary contracts which national banks are authorized to make depends upon the federal statute. On the contrary, we concede that the general rules governing right of property are not infringed by the national banking act. The largest share of the bank's operations are, no doubt, governed by the local laws of the states in which they do business. But the federal statutes *alone* determine whether an act of the bank is *ultra vires;* how its assets are distributable in case of insolvency; and what are its powers and public duties, and the powers, duties, rights, and liabilities, civil and criminal, of its officers. (*McClellan v. Chipman*, 164 U. S. 164; *Davis v. Savings Bank*, 161 U. S. 275; *Easton v. Iowa*, 188 U. S. 220.)

In addition to the enumerated instances in which the provisions of the federal statute are controlling and exclusive, it is also settled that where the federal statute contains any regulation requiring observance of local laws in respect to general contracts, such as the exaction of

usurious interest, and fixes a penalty for non-observance of such regulations, its provisions are exclusive (*Bank v. Dearing*, 91 U. S. 29). The federal statute is paramount, controlling, and exclusive, in so far as it speaks affirmatively, in relation to the general contracts which are ordinarily governed by the laws of the states. In respect to the corporate powers and the duties of the officers, the federal statute is the *measure* and the sole *source* of authority, implying a prohibition where an authority is not expressly granted. Under these well-settled rules the application of the statute to the present controversy can not rationally be denied.

In *McClellan v. Chipman*, 164 U. S. 356–57, Mr. Justice WHITE reiterates and harmonizes the rules above asserted. In the opinion in that case, he said:

"Two propositions have been long since settled by the decisions of this court:

"First. National banks 'are subject to the laws of the state, and are governed in their daily course of business far more by the laws of the state than of the nation. All their contracts are governed and construed by state laws. Their acquisition and transfer of property, their right to collect their debts, and the liability to be sued for debts are all based on state law. It is only when the state law incapacitates the banks from discharging their duties to the government that it becomes unconstitutional.' *First Nat. Bank v. Kentucky*, 76 U. S., 9 Wall. 362.

"Second. 'National banks are instrumentalities of the federal government created for a public purpose, and as such necessarily subject to the paramount authority of the United States. It follows that an attempt by a state to define their duties, or control the conduct of their affairs, is absolutely void, wherever such attempted exercise of authority expressly conflicts with the laws of the United States, and either frustrates the purpose of the national

legislation, or impairs the efficiency of these agencies of the federal government to discharge the duties for the performance of which they were created.' *Davis v. Elmira Sav. Bank*, 161 U. S. 283 (40:701).

"These two propositions, which are distinct, yet harmonious, practically contain a rule and an exception, the rule being the operation of general state laws upon the dealings and contracts of national banks, the exception being the cessation of the operation of such laws whenever they expressly conflict with the laws of the United States or frustrate the purpose for which the national banks were created, or impair their efficiency to discharge the duties imposed upon them by the law of the United States."

The learned and accurate exposition by Mr. Justice DAY of the law that a shareholder has the right, for a legitimate purpose, to examination into the affairs of the business in which he is part owner, and his right of discovery of the methods in which his agents are conducting his own business, found in *McGuire v. Blount*, (199 U. S. 148-59) to which we are cited by defendant, does not contravene any principle here urged. That decision involved a right of property, the right of an owner to dominion over his own property, and to participate, within reasonable limits, in the conduct of business in which he is part owner. That right, under our system, is sacred and declared by the constitution to be inviolable. It is maintained by the opinion on high grounds; but the opinion definitely recognizes every principle contended for here by plaintiffs in error, and is an authority to support their contention. Instead of contravening the act of congress, the opinion definitely asserts its supremacy. At page 159 (*ib.*) Mr. Justice DAY said:

"That the statute did not intend, in withholding visitorial powers, to take away the right to proceed in courts of justice, to enforce such recognized rights as are here involved, is evident from the language used. If the right to compel the inspection of books was a well-recognized common law remedy, as we have no doubt it was, even if included in visitorial powers, as the terms are used in the statute, it would belong to that class 'vested in courts of

justice' which are *expressly* excepted from the inhibition of the statute."

VII.

Mr. Thompson's testimony is fully and correctly stated in his own brief.

The effort in defendant's brief (pp. 96–111) to exhibit Mr. Thompson's testimony in a discrediting light hardly merits rejoinder. Wherever the record shows him to have detailed the full and complete circumstances of each transaction inquired about, so as to establish in each case its integrity, an ellipsis is used in the brief to obscure and hide the details related and explanations given. After employing this art, counsel pretends to lay naked facts together in such a way that, without explanation, they would tend to discrediting inferences. This garbled exposition of his testimony amounts merely to misrepresentation. The same testimony is fully exhibited in Mr. Thompson's own brief (pp. 9–25). The only difference in the manner of laying it before the court is that Mr. Thompson includes details which in each case, the defendant marks with an ellipsis. Mr. Thompson's brief reverts to every insinuating interrogatory and gives the detailed answers, which wipe out the insinuations. The court may trust either the record or the statements of Mr. Thompson's evidence embodied in his own brief, but will find itself obliged to discredit the garbled and insinuating exhibit furnished by the defendants.

The issue, however, as to the ultimate facts established by Mr. Thompson's testimony can hardly be regarded as vital to the decision. It will, doubtless, be sufficient, upon this hearing, that the state supreme court found, upon his

evidence, in favor of his personal integrity. His evidence was exhibited in his own brief merely to show the judgment in an aggravated light. The controlling consideration here is that Mr. Thompson was entitled to have his liability tested by the rules prescribed in the act by Congress. That right was denied to him by the state courts, and he is entitled to have the judgment reversed because of that error, without regard to whether this court might conclude his testimony sufficient to have justified a submission of the cause to the jury under a proper definition of his liabilities.

VIII.

The rule of liability which preserves the element of scienter does not contravene established doctrines of public policy.

Where liability is governed by statute, the rule of public policy at its foundation is purely a legislative question with which the courts have no concern.

The repeated assertions in the brief of defendants to the general effect that preservation of the element of scienter tends to recklessness and faithlessness on the part of directors in the discharge of official and administrative duties, that such rule leaves innocent and confiding depositors and creditors without redress for wrongs suffered, and that it will tend to weaken public confidence in national banks and lessen their efficiency as public agencies, have only the force which nervous rhetoric and passionate oratory lends to a questionable and doubtful cause. Their employment may appeal to the superficial sensibilities, but they are not deep enough to reach or persuade the deliberate judgment. Like most all mere rhetorical flourishes, they may be paraphrased and made to apply to either side of

the argument. The rule urged by plaintiffs in error does not, in fact, operate to deny depositors and creditors of redress. On the contrary, it affords them redress, but requires them, in conformity to correct ideas of business morals, to seek their redress against the wrongdoers who actually perpetrated the frauds of which they complain. Where one innocent person is defrauded, no corrective or stimulus to good business morals is offered by permitting him merely to shift his loss to another innocent person. To pursue the later course would tend only to demoralize business methods, since no man could then know that the conscious rectitude of his own conduct would afford any vindication against a charge of fraud. Let us inquire, then, what has been the policy of Congress and how well that policy has sustained this banking institution of its own creation.

In analyzing the provisions of the national banking act, the following facts will determine the policy adopted by Congress: (1) Faithfulness to official duty on the part of officers and directors of national banks is afforded by imposing penalties only upon the delinquent official. Conscious participation in or wilful assent to the violation of some provision of the banking act is, by section 5239, made the sole cause for imposition of civil penalties or civil liabilities. The policy at the foundation of the criminal punishments imposed by section 5209 is also to visit the punishment solely upon the particular officer guilty of official delinquency. This is well shown by the decision in *Cochran v. U. S.*, heretofore cited and quoted. (2) The associate officers or directors in the same institution with the guilty delinquent, who have not knowingly participated in or consented to the unlawful act, are as definitely, by

the same statutory provisions, relieved of all the penalties consequent upon any unlawful act. (3) The seventh subdivision of section 5136 authorizes national banks to exercise, by their "duly authorized officers," such powers as shall be necessary to carry on the business of banking. The oath of office of the director, prescribed by section 5147, in so far as it refers to administration of the affairs of the bank, is qualified by the clause, "so far as the duty devolves on him." If we understand the history of the statute correctly, the quoted clause was added in 1874.

So it is apparent that Congress deemed visitation of punishments upon the guilty officers, alone, to be a sufficient stimulus to official duty. Congress, doubtless, considered also that men of affairs and character would be free to embark their capital in such enterprises and assume official positions under regulations which exempted them from criminal punishments or civil forfeitures, so long as they did not knowingly violate any of the provisions of that act. The public policy to be pursued in the enactment of this statute creating this public agency was wholly legislative. Congress had power, either to adopt the policy shown, or to embody in the act the dragonian policy here urged by the defendants. After enactment of the statute, it was the privilege of Congress to observe the efficacy, or want of efficacy, of the policy adopted in the original act, and to amend or alter it in any respect in which the test of experience had shown it to be deficient. Time has demonstrated that the enactment adopted is wise and prudent. The legislative policy adverted to has led men of affairs and prudence to invest largely in the stock of national banking associations and to enter their directory, so that

the act itself has developed, probably, the greatest and most efficient financial system in the world.

It must not be overlooked, in this connection, that the innocent depositors and creditors were not lost sight of by Congress. They were given specific and special remedies against such officers as knowingly violated the provisions of the title to their damage, and a sacred fund, set apart for their exclusive use, in the extreme and occasional cases of insolvency, was provided by assessments upon all the stockholders equal to the amount of the capital stock, which, in ordinary cases, would reach solvent debtors other than the adventurous officers, who, in many instances, are ruined by the failure of the bank. Congress provided an agency for the speedy collection and distribution of this fund.

The questions discussed in our original briefs are, therefore, controlling and decisive of the case, and their application to the record will require a reversal of the judgment.

Respectfully submitted,

J. W. DEWEESE,
FRANK E. BISHOP, AND
HALLECK F. ROSE,
Counsel for Plaintiffs in Error.

Lincoln, Neb., March 1, 1907.

FILE COPY.

Office Supreme Court, U. S.
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MAR 19 1907
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1906.

CHARLES E. YATES ET AL., *Plaintiffs in Error*,
v.
JONES NATIONAL BANK, *Defendant in Error*. } No. 230.

CHARLES E. YATES ET AL., *Plaintiffs in Error*,
v.
UTICA BANK, *Defendant in Error*. } No. 231.

CHARLES E. YATES ET AL., *Plaintiffs in Error*,
v.
THOMAS BAILEY, *Defendant in Error*. } No. 232.

CHARLES E. YATES ET AL., *Plaintiffs in Error*,
v.
BANK OF STAPLEHURST, *Defendant in Error*. } No. 233.

SOME NEW REFERENCES.

We desire to call attention to a case not heretofore referred to, that of Utley v. Hill, 155 Mo. Rep. 274, where the court considered the liability of directors of a State Bank, based on a report to the Secretary of State, which

report had been made by the Banking Association as required by a State law.

The question involved was whether the directors in attesting the report could be held liable to a depositor in a common law action for deceit, on the charge of false statements.

The court, in considering this question used the following language, page 274:

"Before the enactment of this statute there was no obligation on directors or officers of a bank to make any kind of a statement of the actual condition of the bank to the Secretary of State or to any one else, nor to publish any such statement in the newspapers. The obligation and duty so to do was created by the statute. The same act which imposed the duty prescribed the penalty for its violation and the tribunal before which the penalty should be enforced; that is, made it a misdemeanor, punishable on information or indictment, by fine and imprisonment. The conclusion is inevitable and unavoidable that no other penalty can be exacted or enforced than that prescribed by the act. Nor can a false statement made by directors of a bank to the Secretary of State be made the basis of a common law action for deceit. The reason is plain. The law exacts the statement; hence it is not voluntarily made. The statement is required to be made to the Secretary of State, so that he may take steps to close the bank if it is dangerous to the welfare of the people for it to continue business, but it is in no sense a statement made by the directors with intent to induce persons to deposit their money in the bank, and therefore a common law action of deceit cannot be predicated upon it. But, above all, the law imposes the duty and prescribes the punishment for a violation thereof. The law vests no right of property or of action in any one which may be vindicated by the common law, and therefore the penalty imposed by the law is exclusive, and no other remedy is open to any one."

In the oral argument of these cases there was an inquiry

from the bench, whether or not the petitions sufficiently stated a cause of action for fraud and deceit under the system of pleading in Nebraska. No particular form of pleading is required in Nebraska, other than a plain statement of facts, and we think there is no doubt that sufficient facts are alleged in the petitions to embrace a cause of action for fraud and deceit, if such allegations be segregated and construed separate and apart from the allegations of negligence and misfeasance charged against the directors of the bank. Clearly there is one cause of action for misfeasance and mismanagement alleged, and if there is another for fraud and deceit it is not separately stated and numbered as required by the Nebraska Code, but all of the facts "jumbled together" in one general averment. The rule of pleading is that a pleading will be construed most strongly against the pleader.

If the petitions are to be construed as actions for fraud and deceit it must be in face of the fact that the petitions disclose an action for negligence and misfeasance in office, as well as the fact that the cases were tried and submitted to the jury by the instructions of the court on the theory of negligence and misfeasance in office, and also on the theory of deceit. It cannot be said that the jury did not decide against the directors by reason of these instructions and the proof on questions of negligence in the management of the bank.

If the actions are held to be for fraud and deceit, the acts complained of, the things done, or neglected to be done, are all embraced in the official duty of the directors as defined by the National Banking Act. Nothing was done by the directors voluntarily to influence anybody. They attested the reports in their official capacity because the banking law required it; and did nothing, and said nothing, to the defendants in error outside of their official duty in attesting some of the reports.

A national bank director's duties and obligations are defined by his oath of office prescribed by Sec. 5147, Rev. St. U. S. This section does not require that the director take upon himself an obligation to perform "the duties which usually devolve upon directors in corporations" nor such as devolve upon them "by the common law." On the contrary, he is required to make oath that he "will not *knowingly* violate or *willingly* permit to be violated, any of *the provisions of this title*." Thus the language of the act of Congress seems to definitely exclude common law duties, and to limit the obligations of the director to a compliance with "the provisions of this title." It is true that an obligation is imposed on the director to diligently and honestly administer the affairs of the association "so far as the duty devolves upon him." But the qualification of the obligation touching administrative duties, contained in the clause quoted, is evidently intended to make that provision harmonize and concur with subdivision 7 of Section 5136, authorizing the association "to exercise, by its board of directors, *or duly authorized officers* * * * all such incidental powers as shall be necessary to carry on the business of banking." The power to delegate administrative duties to the executive officers is thus expressly conferred; and assumption of such duties by the oath of office is by the act qualified, and made to depend upon whether the directors, in exercise of their powers, retain administrative duties, or delegate them to executive officers—either of which courses they are, by the statute, permitted to pursue. Having prescribed these specifically defined duties, Congress, in the same act, very appropriately prescribed the liabilities for their violation by Section 5239. By the repeated holdings of this court, already cited, these liabilities are exclusive. So the suggestion that directors are remitted to the common law for a definition of their full official duties is wholly without merit.

Another inquiry from the bench was whether the reports made to the Comptroller were in fact false, and we fear was not sufficiently and definitely answered. The reports were true reports as taken from the bank's books. They agreed with the totals of the assets as shown in the books, but did not in every instance agree with each item of assets as kept under the headings of accounts in the bank's books. The blank forms of the reports were furnished by the Comptroller, and the headings of accounts in these blank forms did not contain some of the items of assets as shown in the bank's books. Consequently a reclassification and re-arrangement of some of the items had to be made in reports to the Comptroller.

But there was no discrepancy in the reports and the books in the statement of the assets, when thus reclassified.

The counsel for the other side claim that the reports were false because the face value of the assets as reported to the Comptroller was not realized by the Receiver in winding up the affairs of the bank. There is no doubt but that the assets did very much depreciate in value owing to the forced sale and the prevalence of a wide-spread financial panic at that time, but we do not understand that the giving of the full amount of the assets in the reports, would constitute a false report. It would be a hazardous undertaking, as well as an untrue report, if the amount of the assets as shown by the books were changed to an *estimated* value, rather than the true amount as shown by the books.

The fact that Mosher, the President of the bank, issued certificates of deposit to the State Treasurer in amounts of $50,000 and $100,000, and entered the transaction on the books of the bank as certificates for $5.00 and $10.00 and the reports of the bank to the Comptroller were made

up on the entries as they appeared on the books, could not bind nor affect the directors of the bank who were innocent, as they all were, of that process of stealing. The facts pertaining to the amounts of such certificates never developed until after the failure of the bank. We rely upon the numerous decisions of the courts cited in our briefs for a reversal of the state court's judgment.

Respectfully submitted,

HALLECK F. ROSE,
J. W. DEWEESE AND
F. E. BISHOP,
For Plaintiffs in Error.

FILE COPY

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1906

Office Supreme Court
FILED
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JAMES H. McKE

CHARLES E. YATES, ET AL.,
Plaintiffs in Error,
vs.
JONES NATIONAL BANK,
Defendant in Error.
No. 230

CHARLES E. YATES ET AL.,
Plaintiffs in Error,
vs.
UTICA BANK, *Defendant in Error.*
No. 231

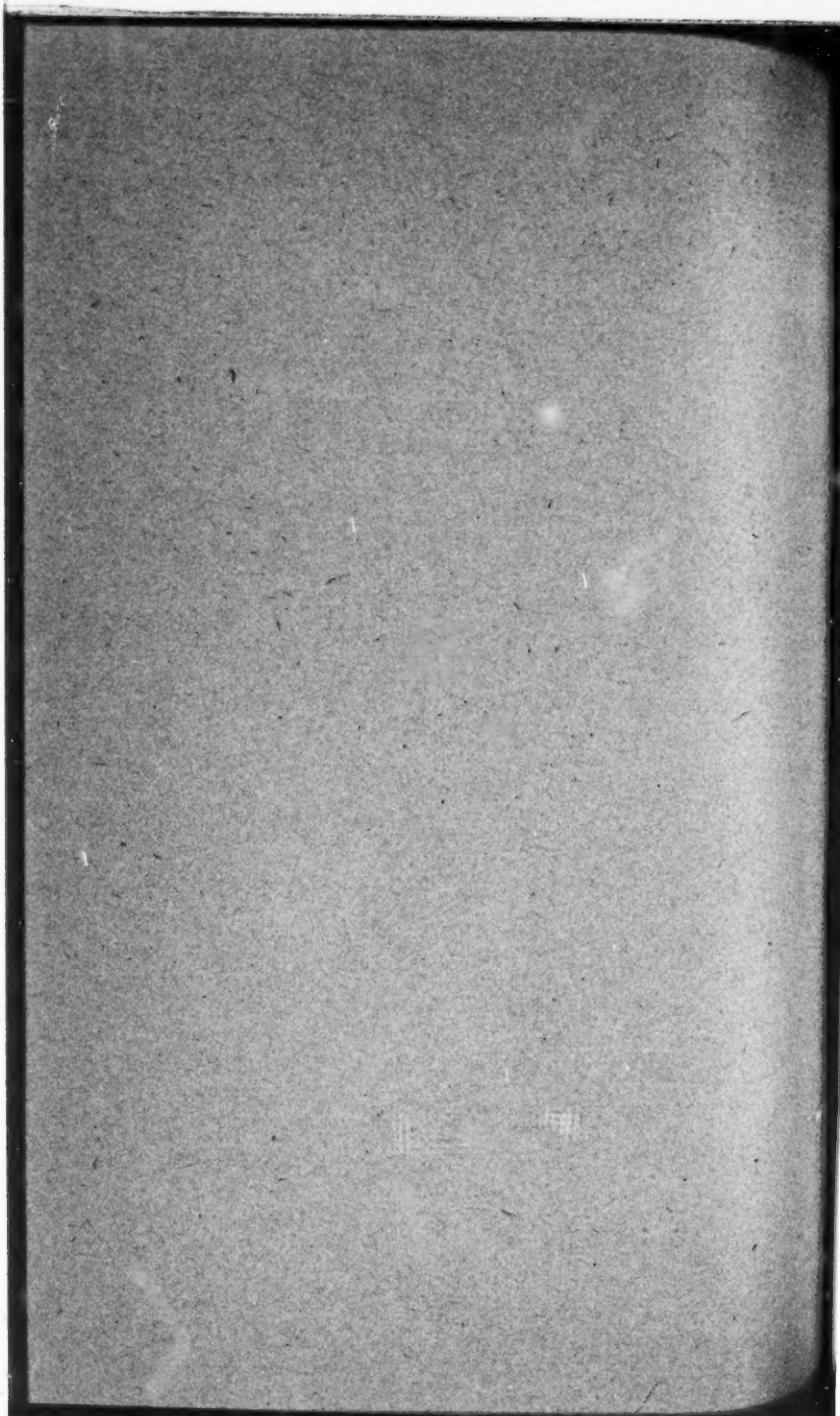
CHARLES E. YATES, ET AL.,
Plaintiffs in Error.
vs.
THOMAS BAILEY, *Defendant in Error.*
No. 232

CHARLES E. YATES ET AL.,
Plaintiffs in Error,
vs.
BANK OF STAPLEHURST,
Defendant in Error.
No. 233

ERROR TO THE SUPREME COURT
OF NEBRASKA

BRIEF OF DEFENDANTS IN ERROR UPON THE SEVERAL MOTIONS TO DISMISS OR AFFIRM.

CHARLES L. BURR.
LIONEL C. BURR,
Attorneys for the Motions.



IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1906

CHARLES E. YATES, ET AL.,
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No. 233

ERROR TO THE SUPREME COURT
OF NEBRASKA

BRIEF OF DEFENDANTS IN ERROR UPON
THE SEVERAL MOTIONS TO DISMISS
OR AFFIRM.

Brief of Defendants in Error upon the several motions to Dismiss or Affirm.

May It Please the Court:

A motion to dismiss or affirm has been filed and duly served on plaintiffs in error in each one of the above entitled cases. We only print a copy of the motion in case No. 230. It is as follows:

Motion to dismiss the writ of error in this action, or to affirm the judgment of the Supreme and District courts of Nebraska.

Comes now the defendant in error by its counsel appearing in that behalf and moves the court to dismiss the writ of error in this action, to the Supreme court of the state of Nebraska for the following reasons, to-wit:

1. The petition of the defendant in error did not in the record specially allege, set up or claim a federal right or federal law, or a federal question, nor did the defendant now the plaintiff in error, specially allege a right, privilege or immunity in or by their said answer.

2. The separate answer of the defendant, now plaintiff in error, did not allege specifically, set up or claim herein, a federal right, claim, privilege, immunity or a federal question, nor did plaintiff in error specially plead or claim any right, privilege or immunity of a federal nature as belonging to him, nor did he specially set up, or base any claim, right, privilege or immunity at the trial or in the record, at the proper time in the proper way.

3. The Supreme court of the state of Nebraska, nor the district court in which said action was tried, did not decide a federal law necessarily involved in this action upon

which the recovery of judgment by the defendant in error against the plaintiff in error, depends.

4. The circuit court of the United States for the District of Nebraska, duly remanded said action from the circuit court of the United States for the District of Nebraska to the district court of Seward county, Nebraska, on two separate occasions and each one of said orders are final and conclusive, and this court has no jurisdiction to review or revise said orders of remand.

5. The state court did not decide a federal question but expressly held it was not necessary so to do, and rested its decision on the independent ground of construing the petition to state a cause of action for fraud and deceit, which decision of the state court is broad enough to maintain the judgment now complained of, nor did the answer to plaintiff in error, nor the motion for a new trial, allege or set up a right, privilege, or immunity under a federal law at the proper time in the proper way.

6 Both the circuit court of the United States for the District of Nebraska, and the circuit court of appeals for the Eighth circuit have in this action between the same parties held, that the original and amended petitions do not allege or set up a federal question, and the same has become the law of this case and this court has no jurisdiction under section 2 of the act of March 3, 1887, to review the same.

The Supreme court of the United States has no jurisdiction either of the subject matter or of the parties to this action.

And said defendant in error by counsel as aforesaid also moves the court to affirm the said judgment from which

said errors purport to have been taken, because although the record may in some manner show that this court has jurisdiction in the premises, yet it is manifest that said error proceedings are prosecuted for delay only.

JONES NATIONAL BANK,
By CHARLES L. BURR,
LIONEL C. BURR,
Its Attorneys.

Lincoln, Nebraska, February 20th, 1907.

Received copy of the above motion together with copy of brief on motion.

DAVID E. THOMPSON,
CHARLES E. YATES,
ELLIS P. HAMER, Deceased.
By J. W. DEWEESE,
FANK E. BISHOP,
HALLECK F. ROSE,
Their Attorneys.

This action was originally commenced in the district court of Seward county, Nebraska, and by plaintiffs in error removed, on two different occasions, to the circuit court of the United States, for the District of Nebraska, and upon motion of defendant in error duly remanded each time. After the action had been remanded to the state court for the first time, defendant in error by leave of the state court, amended its petition, by interlination, and plaintiffs in error removed the action again for the second time. The circuit court held the last removal good (Record No. 230, 66 to 71) but upon appeal to the circuit court of

appeals for the Eighth circuit, the action was for the second time remanded. Jones v. Mosher et al., 107 Fed. 561. Also see Bailey v. Mosher et al., 74, Fed. 15. And this brings us to the first point made in the motion to dismiss or affirm, namely, that the action having been twice remanded from the federal to the state court, this court has no jurisdiction to review the several orders to remand, or of the parties or subject matter of this action.

The last part of section 2 of the act of March 3rd, 1887, reads as follows:

"When any cause shall be removed from any state court into any circuit court of the United States, and the circuit court shall decide that the cause was improperly removed and order the same to be remanded to the state court from whence it came, such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the circuit court so remanding such cause shall be allowed."

We view this important language in this law, as applied to the two orders remanding this action, the same as any final order or judgment in either state or federal court. Congress evidently intended that an order remanding an action back to a state court to be final, as to further proceedings, or jurisdiction in such action, precisely the same as the final order in the case at bar, from which plaintiff in error had a right to appeal from the district to the Supreme court, or from the final judgment in the Supreme court of the state of Nebraska, from which this court could issue its writ of error to the Supreme court of Nebraska.

If the two orders remanding this action to the state court are final, what right has plaintiff in error to complain

of same in the motion for a new trial, and what power, or jurisdiction, has this court to review either one of said final orders, which by this statute, passed on purpose to limit and restrict the jurisdiction of both the circuit court and of the parties to the action and Supreme court of the United States?

In re Pennsylvania Company 137, U. S. 454.

Birdseye v. Schaffer 140, U. S. 117.

Missouri Pacific Ry. Co. v. Fitzgerald 160, U. S. 556.

Gurness v. Patrick County 137, U. S. p. 141.

Richmond & D. R. R. Co. v. Thouron 134, U. S. 45.

Mr. Justice Bradley in the opinion in re Pennsylvania Co. on p. 454 in speaking of this statute, says:

"In terms, it only abolishes appeals and writs of error, it is true, and does not mention writs of mandamus; and it is unquestionably a general rule, that the abrogation of one remedy does not affect another. But in this case we think it was the intention of Congress to make the judgment of the circuit court remanding a cause to the state court final and conclusive.* * * Yet the use of the words "such remand shall be immediately carried into execution" in addition to the prohibition of appeals and writs of error, is strongly indicative of an intent to suppress further prolongation of the controversy by whatever process."

Again it has become the law of this case that no federal question was set up or alleged in the original petition, or in the amended petition in this action. The original petition is found on pp. 60 to 66, Record No. 230, and the petition to remove the case out of Seward county district court is found on pp. 66 to 70, Record No. 230.

It was held in this action by and between these same

parties by Oliver P. Shiras, judge of the United States district court for the Northern District of Iowa, sitting in this action, and by Thayer, circuit judge, in the circuit court of appeals for the Eighth circuit that neither the original petition nor the amended petition made any allegation of a federal nature, as persistently claimed in the answer in the petition to remove and in the assignments of errors, and now alleged and set forth in each one of said pleadings and records herein, and that neither the original petition, the amended petition or the proceedings in removal stated a case arising under the National Banking Act, but did state and allege a cause of action for fraud and deceit under the common-law, and in the case of Bailey v. Mosher et al. 74, Fed. 16, Judge Shiras in the opinion says:

"In Hayden v. Thompson, 17 C. C. A. 592, 71 Fed. Rep. 60, it was furthermore ruled by the same court that a person legally injured by the wrongful acts of the officers and directors of a national bank, and which acts create causes of action under the principles of the common-law, may count on the common-law liability for damages caused him. Actions of this character, however, would not present controversies arising under the laws of the United States, and of them the federal courts could have no jurisdiction, either originally or by removal, if they were between citizens of the same state. The petition in the case now before the court is clearly based, not upon the provisions of the National Banking Act, but upon a liability claimed to arise under the principles of the common-law; and, as the requisite diversity of citizenship does not exist to justify a removal on that ground, it must be held that the state court rightfully refused to order a removal of the case."

Thayer, circuit judge, held in Jones v. Mosher et al., in 46 C .C. A. 174, construing both the original and amended petition in this action:

"Applying this rule to the case in hand, the result is that if the amended complaint which was filed on May 3, 1897, stated substantially the same cause of action which was stated after it was amended by interlineation on March 16, 1899, then the second petition for removal was filed too late to oust the jurisdiction of the state court, and we need not concern ourselves with the question, whether either one of the complaints, original or amended, stated a cause of action arising under federal laws. If the interlineations made on March 16, 1899, did not change the nature of the cause of action which was counted upon by the amended complaint, then it is manifest, we think, that the defendants waived their right to remove the cause by failing to take any action looking to its removal for nearly two years thereafter. And this is so even if it should be conceded that the amended complaint differed from the original complaint in disclosing a federal question. We have made a careful examination of the complaint as it stood both before and after it had been changed by interlineation, and such comparison has satisfied us beyond a reasonable doubt that such interlineations as were made by leave of court on March 16, 1899, were unimportant and effected no change whatever in the cause of action. If the interlined complaint shows a right of action arising under the federal laws, then, beyond all controversy, the amended complaint before it was interlined showed a right of action of the same character; and the same statement may be made with reference to the original complaint of February 25, 1895, which, as the lower court held, did not disclose a federal question, but stated a cause of action at common-law for deceit. Bailey v. Mosher (C. C.) 74, Fed. 15. Realizing, apparently, that the second application for a removal of the cause was made too late, for the reasons already stated, counsel for the defendants have suggested that in as much as the original petition for removal, which was filed on March 29, 1895, remained on file, it operated proprio vigore to oust the jurisdiction of the state court as soon as the amended declaration was filed. This suggestion assumes, of course, that the second complaint differed from the first or original complaint as respects the cause of action stated therein, which assumption in our judgment is erroneous. We are unable to discover any difference in the cause of action stated in the two complaints. But aside from this

view of the case, we are of opinion that the original petition for removal was functus officio when the case was originally removed and remanded, and that it could not have any effect upon a subsequent amended complaint filed in the case, even if the latter did state a different cause of action arising under federal laws."

These authorities, together with the amended and original petitions, the petition to remove the action and the motions for a new trial, all clearly show that this court has no jurisdiction of this action, or the parties thereto, and that the contention of plaintiffs in error concerning the allegations of the original and amended petitions has been held by the law in this case against him, and if plaintiffs in error desired to have a federal right reviewed by this honorable court after the cases were remanded, they should have laid the proper foundation so to do, at the proper time in the proper way.

Second Point.

The state court did not decide a federal question, but expressly held it was not necessary so to do, and rested its decision on the independent ground, of construing the petition, to state a cause of action for fraud and deceit, following Shiras, judge, and Thayer, circuit judge, supra, which decision of the state court is broad enough to maintain the judgment now complained of, nor did the petition of defendants in error nor the answer of plaintiffs in error, nor the motion for a new trial, allege or set up a right, privilege, or immunity, under a federal law or a federal question.

"A suit cannot be one arising under the constitution, or

laws of the United States, until it has in some way been made to appear on the face of the record that some title, right, privilege or immunity upon which the recovery depends, will be defeated by one construction of the constitution, or a law of the United States, or sustained by an opposite construction."

Starin v. New York, 115 U. S. 248.

Germania Insurance Co. v. Wisconsin, 119 U. S. 473.

City of New Orleans v. Benjamin, 153 U .S. 411.

The judicial construction does not depend upon the validity of the claim set up under the constitution or the laws of the United States, but upon the fact, that the claim involves a real and substantial dispute or controversy in the suit.

Nashville and Cy. Ry. Co. v. Taylor, 86 Fed. 168.

St. Paul & M. Ry. Co. v. St. Ry. Co., 15 C. C. A., 167.

St. Joseph & G. Ry. Co. v. Steele, 167 U. S. 659.

A claim which in fact depends upon questions of local or geenral law is not within the jurisdiction, even though a reference to a federal statute is made.

St. Paul & Co. Ry. Co. v. St. Ry. Co., ubi supra.

The existence of a federal question must be shown upon the face of plaintiffs' declaration or bill, in order to give federal jurisdiction, and it cannot be established by a petition for a removal, answer or demurrer.

State of Indiana v. Oil Company, 85 Fed. 876.

Tennessee v. Union Planters Bank, 152 U. S. 454.

Pacific Co. v. Ellert, 64 Fed. 421.

Florida & Co. v. Bell, 87 Fed. 369.

Plaintiffs in error do not set up in their answer a claim, privilege, or immunity, belonging to them under any federal law which must appear by averments so distinct and positive as to place it beyond question, by a statement in legal and logical form, such as required by good pleading, that plaintiffs in error or that defendants in error in their petition intended to rely on the same.

The answer of the plaintiffs in error, in a certain way attempts to set up: First, a federal right in the defendants in error; second, a federal right, or claim of right, privilege, or immunity, in plaintiffs in error, in and to a certain judgment for costs of suit alleged to have been obtained in an action between the same parties pending in the circuit court of the United States for the District of Nebraska, but that said judgment for costs is a bar; third, payment of plaintiffs' claim; fourth, that necessarily from the allegations of fraud and deceit alleged in the petition, plaintiffs in error insist that the old common-law right and remedy for damages for false and fraudulent representations, the basis of the old common-law action for fraud and deceit, was abolished in the several states as to depositors and creditors, by the acts of Congress relating to national banks, and the damages sought to be recovered by plaintiffs, was an asset of the bank, its receiver, its stockholders or the general creditors of the bank. But that said assets belong to the bank, its creditors, its receiver, or its stockholders. Not to plaintiffs in error.

Charles W. Mosher, the president, and Richard C. Outcalt, the cashier, of said bank, also filed a separate answer

but they are not parties to the separate answer of David E. Thompson, nor to the separate and joint answer of Charles E. Yates and Ellis P. Hamer, appearing on pages 18 to 24, of Record No. 230, but it is necessary to go to the two answers last named to see the vast difference between what plaintiffs in error claim now in the assignment of errors in this court, and what they really claimed by their separate answers; by the instructions offered to the trial court to the jury; by any evidence introduced and by the motions for a new trial in the trial court.

These answers are substantially duplicates and set up the same defense. The first defense simply recites certain facts concerning the Capital National Bank, and that defendants were stockholders; that the bank was closed and a receiver appointed; that no forfeiture of the franchise of the banking association has ever been declared by the Comptroller of the Currency for any reason whatever. The third paragraph of the first defense mentions the duties and obligations of the several directors and stockholders of said bank which were such, and only such, as required by the "National Banking Act."

The fourth paragraph of the first defense denies that they signed or attested the reports referred to in the amended petition, or that they made, signed or altered any report, purporting to show the condition of said bank "for the purpose and in the manner alleged in the plaintiffs' said amended petition.'

The fifth paragraph of the first defense alleges:

"That the cause of action set out in plaintiffs amended petition, if any it has, is founded upon alleged facts, which

if true, constitute a violation by this defendant **as a director or stockholder of his duties as such director or stockholder** as laid down and defined in the National Banking laws of the United States above referred to. * * * That if any liability attaches to him as **director or stockholder** of said bank, or any act done, or duty neglected **as set forth in the amended petition,** or otherwise, that **such liability** is determined and controlled by the National Banking act **concerning the management of national banks** and that in determining the liability of this defendant, there is necessarily involved the construction of said banking acts **relating to the duties of directors and stockholders of said national banks.** That a federal question is involved in determining the liability of this defendant by reason of the **alleged mismanagement of said bank** and the **alleged** neglect of duty on the part of this defendant."

We undertake to say that plaintiffs in error did not in and by this allegation specially set up in legal and logical form, and claim a federal right, privilege, or immunity of his own, under the "National Banking Act" or under section 709 of the Rev. Stat. of the United States.

All or nearly all that plaintiffs in error attempted to do by this pleading was to set up **what is alleged and set up in the petition.** In other words, plaintiffs in error did not by clear and concise language and with proper and good pleading set up and claim any right of his own, as now set up in the assignments of error appearing in the printed Record No. 230 at pp. 111 to 113, wherein it is now specially set up that the court erred in deciding that section 5239 of the revised statutes of the United States limits or controls the liability of plaintiffs in error for making, attesting and publishing the reports to the Comptroller of the Currency, whereas nothing of the kind was held, decided or passed upon by the state courts, nor was section 5239 even men-

tioned in the motions for a new trial or the answer.

Assignments numbers 6 and 7 are quite alike except that in No. 7 it is now claimed that the decision in this action by the Supreme court of the state is in violation of section 5239 of the revised statutes. But if you turn to the allegations of the answer and the motions for a new trial, it will be seen that plaintiffs in error do not claim or base any federal right under sections 5239 of the revised statutes, nor did they set up or specially plead such a right as belonging to them or either of them, nor did any one of these plaintiffs in error at the proper time or in a proper way make such claim. And what is true as to section 5239 is also true as to section 5211 of the revised statutes now mentioned in assignment No. 9, and section 5234 and section 5236 of the National Banking Act now mentioned in assignment No. 10, together with section 709 of the revised statutes now mentioned in assignment No. 11. Not one made thereunder in the answer, or in the motion for a new trial, and no right, title, privilege, immunity or demand was specially set up or pleaded by any one of these plaintiffs in error, in or under any one of these laws in the trial court, nor can it be fairly said that a direct or positive claim was made under the "National Banking Act." Plaintiffs in error did not in the state court claim any right arising under any such laws either by pleadings; by their evidence; by their instructions to the jury or in the motion for new trial in the trial court.

What the plaintiffs in error did allege by the separate answer of David E. Thompson and by separate and joint answer of Charles E. Yates and Ellis P. Hamer was that the plaintiffs, now defendants in error; the bank; the cred-

itors of the bank; the directors of the bank; the stockholders of the bank, or using the plural number in said answer, "all banks" mentioned in the "National Banking Act," had a federal right, or must perform said duties, under the "National Banking Act," which gave to them the right of removal out of the state court into the federal court or by inference that they had a right, privilege or immunity, under the "National Banking Act" belonging to them; not to plaintiffs in error, and that is the reason why it is alleged in the third, fourth and fifth paragraphs of the first defense in the answer (Record 230) and make use of the following language:

"That the duties and obligations of the directors and stockholders of said bank were such and only such as were required by the National Banking Act, * * * and that if he (plaintiff in error) made, signed or attested any report showing the conditions of said bank for the **purpose and in the manner alleged in plaintiff's amended petition,** it is founded upon the alleged facts which, if true, constitute a violation by these defendants as a director or stockholder of his duties as such director or stockholder as laid down and defined in the National Banking laws of the United States **for any act done or duty neglected as set forth in said amended petition or otherwise. * *"**

Plaintiffs in error made reference to the "National Banking Act" and the "National Banking laws" in the state court for the further reason appearing in the first paragraph of the motion for a new trial.

"**First, that said cause of action had been duly and legally** removed to the federal court on account of the federal questions involved as shown in plaintiffs' petition; and this court had no jurisdiction or power under the law to proceed further with the trial of said cause."

It is quite clear from these allegations that plaintiffs in error considered a federal question appeared on the face of the petition, not in themselves but in the bank, the creditors or the stockholders, and therefore the action was removable, and that the duties and obligations of the several "directors and stockholders" reference being made to them under this law, and the right they, or the bank, might have had under a federal law, together with the allegations in the answers referring to plaintiffs' petition, that the action was removable because of the allegations set forth in the amended petition, but the allegation is very uncertain and ambiguous whether any federal right the pleader had was specially and clearly set up or claimed or relied upon in either one of the two answers, as a defense in the action.

It is held by this court that:

"It is well settled that in order to give this court jurisdiction to review the judgment of a state court against a title or right set up or claimed under a statute of, or an authority exercised under the United States, that a title or right must be of the plaintiff in error and not of a third person only."

Owings v. Norwood, 5 Cranch 344.

Montgomery v. Hernandes, 12 Wheat 129-132.

Henderson v. Tenn., 10 How. 311.

Hales v. Gaines, 22 How. 144-160.

Long v. Converse, 91 U. S. 105.

Giles v. Little, 134 U. S. 650.

Ludeling v. Chaffee, 143 U. S. 305.

The entire second defense of the answers is concerning a certain judgment claimed to have been obtained in an

action of like title between the same parties in the United States circuit court for the District of Nebraska, wherein a judgment for costs was rendered in the sum of $125.73, and that defendant in error failed and neglected to pay said judgment for costs and that said judgment is a bar to the prosecution of this action. But neither Thompson, Yates or Hamer were even a party to the action of Bailey v. Mosher et al., cited above, and this judgment is not even urged in the brief of plaintiffs in error as against any of deefndants in error, save and except Thomas Bailey. We therefore leave the argument as to the difference btween the cause of action set up in the old petition of Bailey v. Mosher as determined by Caldwell, circuit judge, and the petition in case at bar as determined by Shiras, district judge; Thayer, circuit judge, and the Supreme court of Nebraska.

The third defense is simply an allegation of payment and this court has no jurisdiction over any of the matters alleged in the third defense. The fourth defense (23 Record No. 230) in the answer alleges:

"* * * That if he neglected any duty as such director or stockholder, or committed any of the wrongs complained of in the plaintiff's amended petition, whereby the bank becomes insolvent and gave rise to a cause of action against this defendant sounding in damages, said cause of action existed, if any, in favor of the bank or the receiver of said bank after his appointment, and not in favor of this plaintiff."

So far, then, as to any of the defenses set up in the two answers, not a single word appears in the same complying with section 709 of the revised statutes, specially setting up or making a claim to a federal right, privilege or im-

munity by a plaintiff in error in himself, which this court has jurisdiction to review. There is in the answer some inferences that the Capital National Bank; the receiver of said bank; the directors; the defendants in error or the stockholders had a federal right or claim under the "National Banking Act" or that the cause of action set up in the amended petition under the banking laws of the United States belonged to said bank, or its receiver, but neither said bank or its receiver, or its directors or stockholders being a party to this suit, under the authorities above cited, it has become wholly immaterial as to the allegations concerning any federal right owned or claimed by the defendants in error, the bank, its receiver, its stockholders or its board of directors.

But the fourth defense continues in the allegation that if plaintiffs did deposit their money in said Capital bank as alleged, and the bank then failed and became insolvent, the plaintiffs could not individually recover the said money **from said bank** and said damages when recovered would, under the law, be distributed ratably by said bank, or by the receiver of said bank among the creditors and stockholders of said bank.

This is a clear allegation of a cause of action, or a cause of defense in a third party, to-wit: the bank; its receiver; its creditors or its stockholders. There is no pretense of any right or claim, privilege or immunity, of the plaintiffs in error, under any federal law on behalf of himself in this allegation.

Under section 709, granting jurisdiction to this court of:

"Where any right, title, privilege or immunity is claimed

under the constitution, or any treaty or statute, or commission held, or authority exercised under the United States and the decision is against the title, right, privilege or immunity, specially set up or claimed by either party under such constitution, treaty, statute, commission or authority may be re-examined. * * *"

And this court has held:

"Jurisdiction in such case cannot be inferred argumentatively from averments in the pleadings, but the averments must be positive."

Hamford v. Davies, 163 U. S. 273.

We assert it to be the law of this court, in order to give jurisdiction in this case under section 709, that some right, privilege or immunity of the plaintiffs in error must be specifically pleaded, some federal right or some federal statute, and a distinct and special claim thereunder, in language that is so clear and plain as to show that the plaintiff in error himself, or some one of them, intended to rely upon the same, whereas it is clear and plain from the allegations of the answers that the plaintiffs in error did not make or claim a federal right, privilege or immunity which he insisted upon as his, and under which he claimed and pointed out to the trial court that the federal courts would protect him in such right.

The amended petition appearing on pages 7 to 12 of the printed record need hardly be copied by us at large, but we assert that not one sentence, line or paragraph thereof appears in the whole petition setting up a federal right blonging to the defendants in error whereby the defendants in error were made to rely or claim under or by virtue of

a federal law, and about as strong a part of the petition to aid plaintiffs in error is:

"Plaintiff states that by reason of facts as above set forth and the false and fraudulent statements, advertisements and representations of the defendants the plaintiff has been damaged in the sum of Twenty-Five Thousand ($25,000) Dollars; wherefore plaintiff prays judgment against the defendants and each of them for the sum of Twenty-Five Thousand ($25,000) Dollars, his damages with interest thereon from January 21st, 1893, at 7 per cent and costs of suit."

Perhaps the first, second, third and fourth paragraphs of the motion for a new trial will more clearly set forth the federal right, privilege or immunity claimed by plaintiffs in error than any other concise statement in the record. The same appear on pages 49 and 50 of Record No. 230, and are as follows:

"I. That said cause of action had been duly and legally removed to the federal court on account of the federal questions involved, as shown in the plaintiff's petition; and this court had no jurisdiction or power under the law to proceed with the trial of said cause.

"2. The court erred in the admission of any testimony over the objection of this defendant, for the reason that under the cause of action set forth in the plaintiff's petition being one to recover damages on account of the negligence, misconduct and mismanagement of the bank on the part of this deefndant the plaintiff is not, as a matter of law, entitled to recover.

"3. The damages alleged in the plaintiff's petition, if any existed, on account of the charges made in said petition could only be recovered by the bank or by the receiver, and ratably distributed among all the creditors and stockholders of said bank, and could not be recovered by the plaintiff for itself individually.

"4. The court erred in taking jurisdiction of said case

and the hearing of the proof under the allegations of the plaintiff's petition over the objection of this defendant, for the reason that the duties and liabilities of this defendant as a director of the Capital National Bank are governed and controlled by the National Banking Act, under which said bank was organized, and for which this defendant was acting in the capacity of a director; and the damages growing out of the mismanagement, negligence or fraud of this defendant as charged in said petition, if the same existed, would not accrue to this plaintiff, but would be governed and controlled by the law governing the management of the said bank under the National Banking Act and the liabilities of said defendant under said act as a director of said bank."

The above is perhaps as strong a statement as appears in the records and is substantially the only attempt in the trial court to raise a federal right on behalf of plaintiffs in error.

A question of assessment of a national bank is not a federal question.

Williams v. Weaver, 100 U. S. 547.

And so in the case at bar the cause of action set up in the original and in the amended petitions is as old as the common-law itself, the right to a cause of action for fraud and deceit existed long before a federal question, or even our federal government, came into existence. The state court, Shiras, district judge and Thayer, circuit judge, all held that the cause of action stated in the original petition and in the amended petition is one for fraud and deceit, and we feel confident that this court will hesitate long before it will hold that all the defendants in error were endeavoring to accomplish by the cause of action was to establish or collect an asset which belonged and should go

to the receiver of the bank for the benefit of general creditors when they had suffered so severely personally in damages, which asset would have to be equally divided pro rata among hundreds of creditors of the defunct bank, instead, as stated on the face of the petition, to be a claim for individual damages caused by the false and fraudulent representations of the plaintiffs in error.

In Chappell v. Waterworth, 115 U. S. p. 102, this court holds that under the acts of March 3, 1887, and August 13, 1888, a case not dependent on the citizenship of the parties

"Cannot be removed from a state court into the circuit courts of the United States, as one arising under the constitution, laws or treaties of the United States, unless that appeared by the plaintiff's statement of his own claim, and if it does not so appear, the want cannot be supplied by any statement in the petition of removal or in the subsequent pleadings."

In Tennessee v. Union & Planters Bank, 152 U. S. 454, this court in an exhaustive opinion by Mr. Justice Gray held, that the jurisdiction of the circuit courts, either original or upon removal, "must appear at the outset from the declaration or bill of the party suing that the suit is of that character."

The petition in the case of Oregon Short Line Ry. v. Kottowe, 162 U. S. 490, alleged as much of a federal question, perhaps more so, than does the petition at bar, but the court held that under Tennessee v. Union & Planters Bank and Chappell v. Waterworth that the cause of action stated in the petition was really one of negligence, while in the case at bar it is one of negligence and of fraud and deceit.

We venture the assertion that not one positive or special averment, allegation or paragraph can be quoted from the petition of defendants in error, or from the separate answer of plaintiffs in error, wherein or whereby it is alleged, set up, claimed or relied upon a federal law, or a federal right of any kind by either one of the parties hereto. It so happened that the defendants were pretending to and were carrying on a national bank created under the laws of the United States and some of the defendants were directors, some managers and some officers of the bank, but all of them induced defendants in error to believe that the bank was a safe and sound institution wherein to place his money, and the reports of the condition of the bank to the Comptroller of the Currency showing the good standing of the bank, were published in the local newspapers, seen and read by plaintiffs who relied upon and believed said published statements and verbal representations to be true, whereas said bank was insolvent from the very day it was organized as a national bank and until its doors were closed in bankruptcy, and it is the hope of plaintiffs in error that these mere references to the "National Banking Act" will now be taken as a positive allegation and claim of a federal right of plaintiffs in error.

In charging fraud in pleadings under the state law, the petition must state facts, not conclusions, hence it is from inferences, conclusions and forced construction to be placed upon the petition, as well as the separate answer, that plaintiff in error hopes to have the court meet with his views.

This court is bound by the findings of the trial court which were sustained by the Supreme court of the state,

and they are conclusive and binding upon this court. We quote from Egard v. Hart, 165 U. S. on p. 191 from the opinion in the case of Mr. Justice White:

"It is clear if these questions of fact are adequate to determine the controversy between the parties and broad enough to maintain the judgment, independent of any federal question, then we are without jurisdicition although the state court may have also decided such a question. Eustus v. Bollies, 150 U. S. 361. N. Y. Railroad v. Woodruff, 153 U. S. 689. Hammond v. L. Ins. Co., 156 U. S. 633."

The case at bar is largely like the case of Zadig v. Baldwin, 166 U. S. 485, and the same order should be made herein, as in that case.

But the words of the statute demands that plaintiff in his petition **"must specifically plead some federal right in language so that it is plain and clear that plaintiff himself intended to rely on the federal law.'**

No one, so it seems to us, can successfully point out that plaintiffs in error intended by their answer or that defendants in error intended to set up by the petition a right, privilege or immunity under a federal law. The petition rings with fraud and deceit, with false representations, with reliances by defendants in error upon such fraudulent statements and that plaintiffs believed them to be true and a claim that because of such fraud he was damaged in the amount named in the prayer to the petition. While the answer alleges the right of defendant in error, the board of directors; the stockholders; the bank or the receiver of the bank and of the cause of action set up in the petition of "banks' generally, named in the "National Banking Act." Not a national statute, law or constitution, section or para-

graph thereof is "specially set up" or "specially pleaded" or relied upon or a claim made thereunder by the defendants or plaintiffs in error, either in the petition or the answer, and it is only by a forced construction or by a wild inference that plaintiffs in error can see some federal right that they think defendants in error; the bank; the receiver or the bank; the stockholders or the "banks" named in the "National Banking laws" intended to or should be compelled to rely upon.

In Oxley Stave Co. v. Butler, 166 U. S. 648, the syllabus in that case is as follows:

"This court cannot review the final judgment of the highest court of the state even if it denied some title, right, privilege or immunity of the unsuccessful party, unless it appear from the record that such title, right, privilege or immunity was "specially set up or claimed" in the state court as belonging to such party under the constitution or some treaty, statute, commission or authority of the United States, revised statutes 709.

"The words 'specially set up or claimed' in that section imply if a party in a suit in a state court intends to invoke for the protection of his rights the constitution of the United States or some treaty, statute, commission or authority of the United States, he must so declare, and unless he does so declare 'specially,' that is, unmistakably, this court is without authority to re-examine the final judgment of the state court. **This statutory requirement is not met if such declaration is so general in its character that the purpose of the party to assert a federal right is left to mere inference."**

In Levy v. Superior Court of San Francisco, 167 U. S. p. 175.

The syllabus to the case is as follows:

"Oxley Stave Co. v. Butler County, 166 U. S. 648, fol-

lowed to the point that "the jurisdiction of this court to re-examine the final judgment of a state court cannot arise from inference but only from averments so distinct and positive as to place it beyond question that the party bringing a case here from such court intended to assert a federal right.

"A definite issue in respect to the possession of the federal right must appear and be distinctly deducible from the record."

Muse v. Arlington Company, 168 U. S. 430.

The writ of error was dismissed in this case on quite similar grounds as stated in last authority.

In Mutual Life Ins. Co. v. Kirdoff, 169 U. S. 103, the last part of the syllabus is as follows:

"Oxley Stave Co. v. Butler Co., 166 U. S. 648, cited, quoted from and approved to the point that the words 'specially set up or claimed,' in Rev. Stat. 709, imply that if a party in a suit in a state court intends to invoke for the protection of his rights, the constitution of the United States, he must so declare, and unless he does so declare 'specially,' that is, unmistakably, this court is without authority to re-examine the final judgment of the state court."

In the case of Kipley v. Illinois, 170 U. S. p. 182, Mr. Justice Harlan held as follows:

"When the jurisdiction of this court is invoked for protection against the final judgment of the highest court of a state of some title, right, privilege or immunity secured by the constitution or laws of the United States, it must appear expressly or by necessary intendment, from the record, that such right, title, privilege or immunity was specially 'set up or claimed' under such constitution or laws, as the jurisdiction of this court cannot arise in such case from inference, but only from averments so distinct and positive as to place it beyond question that the party bringing the case up intended to assert a federal right."

Chief Justice Fuller in the Western Union Telegraph Company v. Ann Arbor Railroad Company, 178 U. S. p 239, held as follows:

"When a suit does not really and substantially involve a dispute or controversy as to the effect or construction of the constitution or laws of the United States, upon the determination of which the result depends, it is not a suit under the constitution and laws; and it must appear on the record, by a statement in legal and logical form, such as is required in good pleading, that the suit is one which does really and substantially involve a dispute or controversy as to a right which depends upon the construction of the constitution, or some law or treaty of the United States, before the jurisdicition can be maintained on this ground."

In the case at bar the plaintiffs in error as well as defendants in error did not specially plead, set up or claim under any right at all under any special law or statute of the United States, neither was there an issue raised by and between any allegation in the petition and the answer of plaintiffs in error, or by the reply, as to any federal right, privilege or immunity, or claim of right by either of the parties to this action.

The only federal right that can be deduced by inference in these premises is the reiterated claim of plaintiff in error that defendant in error does of necessity make such claim, by the petition, but from the beginning of this action up to the present time defendants in error have made a clear, positive and distinct claim and allegation of fraud and deceit; has successfully proved the same; has recovered a judgment for the same; has succeeded in obtaining the judgment of Shiras, district judge, and Thayer, circuit

judge, together with both the trial court and the Supreme court of the state, holding plaintiffs in error liable for fraud, and nothing but fraud, under the petition and the general laws of the state of Nebraska.

Again nothing in the record shows more clearly that the damages sought to be recovered by the petition are not the assets referred to or the cause of action arising under any one of the several sections of the "National Banking Act" than does the evidence in this case, and to illustrate this more clearly take the evidence of H. T. Jones, the cashier and managing officer of the Jones National Bank, who, on p. 191 of the bill of exceptions, says:

"Q. Was the Capital National Bank of Lincoln your correspondent, as it is termed in banking? A. Yes, sir. Q. Do you know the amount of money the Jones National Bank had on deposit with the Capital National Bank and which the Capital National Bank was owing the Jones National Bank on the 21st day of January, 1893? A. Our books showed $12,529.23, but the facts were, that they were owing us $17,529.23 on account of a $5,000 remittance I had ordered them to make, and sent them the money, and they reported to me that they had, but they never did. Q. What was the remittance you ordered them to make? A. $5,000 to the Chemical National Bank of New York City. Q. And did the Capital National Bank report to you that that amount had been remitted to the Chemical National Bank for the Jones National Bank? A. It did on the 16th day of January, 1893. Q. I hand you exhibit No. 1054 and will ask you from whom that was received and where you received it? A. It was received in the regular course of business, by mail, from

the Capital National Bank, a postal card in the handwriting of Colonel Hale. Q. What does the writing on this postal card indicate, what does it mean? A. That they have remitted for our account, New York, $5,000. Q. Is that the item to which you referred in your previous answers, the one which you had ordered transferred to the Chemical National and which the Capital National had not remitted? A. It is. Q. And does that item account for the difference betwe en the amount as shown on your books, which they owed you, and the amount which they actually owed you? A. It does. Q. At the time you ordered this money forwarded or transferred by the Capital National Bank to the Chemical National Bank, did you give the Capital National Bank of Lincoln credit on your books for the $5,000? A. Yes, sir.

Mr. Thomas: We offer in evidence exhibit No. 1054. . . . No objections.

Exhibit No. 1054 received and read in evidence as follows:

Addressed: Jones National Bank, Seward, Nebraska.

(Lincoln, Nebr., Jan. 17, 1:30 a. m., '93)

C. W. Mosher, President; H. J. Walsh, Vice-President;
R. C. Outcalt, Cashier.

CAPITAL NATIONAL BANK.

Lincoln, Nebraska, 1-16, 1893.

Yours of.....Received with enclosures as stated.

Credited.....Entered for collection.....We remit.

1009 New York $5,000
Chicago
Ex. 1054, OPH. Omaha
Currency
Silver

This bank in receiving collections elsewhere than in Lin-

coln acts only as your agent and assumes no responsibility beyond that of due diligence on its part.

Yours respectfully,

R. C. OUTCALT, Cashier.

The court will please understand that this postal card, exhibit No. 1054, was simply a false representation made by the Capital Bank in order to obtain the $5,000 from the Jones Bank. The Capital Bank did not remit said $5,000 to (The Chemical National Bank) New York, as falsely stated "we remit $5,000, New York." This money was obtained by the Capital Bank after years of business establishing a splendid credit with the Jones Bank, but the money was obtained in no real different manner than had a burglar entered the Jones Bank with jimmy and dynamite. The receiver of the Capital Bank, or the Capital Bank, as alleged in the answer in this case, would have no cause of action for this $5,000, to be recovered by the Capital Bank under the "National Banking Act" as an asset to be distributed pro rata among all creditors of the Capital Bank. If the Jones Bank can only have its pro rata share distributed to it for this 5,000 it would only be adding insult to injury and the bare statement of facts as shown by this evidence clearly shows that the cause of action set up in the petition is for fraud and deceit and is not, cannot be, for assets wrongfully diverted from and belonging to said Capital Bank. This item of $5,000 never was nor could it ever become an asset of the Capital Bank.

The date of this postal card is January 16th, 1893. The bank is said to have failed on January 21st, but the 21st was Monday when it failed to open its doors,, so that in fact it really failed on Saturday, January 19th. The card is dated

the 16th. It was stamped by and reached the U. S. post-office on the 17th at Lincoln, Nebr., at 1:30 a. m. So that it was impossible for it to reach Seward until late on the 17th or early on the 18th, which was Friday, the day before the bank in fact failed. In other words, the Jones Bank was swindled out of $5,000 by means of this P. O. card and the money so obtained ran this bank Saturday, otherwise it would have closed its doors on Friday the 18th. Can it be possible that such a claim for damages belongs to the bank or the receiver or the general creditors or the stockholders of the Capital Bank, and that the National Banking Act has destroyed and taken away the right of the Jones Bank to recover such a damage in an action for fraud and deceit? The Capital Bank was not damaged, it simply received $5,000 by the fraud of plaintiffs in error.

But let us go to the evidence of Thomas Bailey for one more illustration of whether the damages named in the petition belong to the Capital Bank, its receiver or the general creditors of the bank.

On p. 173, Bill Ex., Mr. Bailey says:

"Q. Tell what your transaction was? A. In the first place I went to the bank to see what interest they were paying before I took this out. I received notice from the First National Bank that they wouldn't only give me 5 per cent interest, and I thought this Capital National Bank was as good as the First, and they offered me 6, and the consequence was I just signed the certificate of deposit over to them and they gave me their certificate for it. Q. Have you any memorandum by which you can refresh your memory? A. October 11th, 1892. Q. Well, how much was that? A. Ten thousand dollars I deposited there that

day. Q. And when did you have any other transaction with the bank with reference to the matters involved in this suit, if any? A. Well, I deposited some more in December 28th, 1892. Q. How much? A. I think it was $2,000. I don't remember the exact amount. Q. Now how many transactions did you have with the bank? A. I think that about all that I can remember. I drew five hundred dollars out January 19th, 1893. Q. Well, now you may state how you came to do business with the Capital National Bank instead of the First National Bank. A. The reason was the First National only wanted to give me 5 per cent on my money and I went down to the Capital National Bank and they offered me 6. Q. How did you come to go to the Capital National Bank? A. I went on purpose to see what they would pay on the money and I thought it was just as good as the First National. Q. What information did you have as to the condition of the Capital National Bank? A. As soon as I went in they handed me a card and the directors and stockholders of the bank were on that card and I took the papers several years previous. Q. What papers? A. The Semi-Weekly Journal, I believe, and the Call. Q. State what you saw in them if anything? A. I supposed it was as good as I could do. Q. What did you see? A. I saw that the bank was in pretty good circumstances, as I supposed the way the amount of assets read in the published statements. Q. You say they gave you a card of the bank on which the officers' names and directors appeared? A. Yes as soon as I came into the bank and told them I had some money, I had in the First National Bank, and they offered me 6 per cent and I thought they were just as good as the other and I

thought I would like it. Q. State when it was with reference to time? A. I suppose ever since the bank started, for I read the papers every day and took particular notice. I had some money to loan out and I took a little notice where I thought was the best place to put it. Q. And what reliance did you make, if any, upon these statements? A. Well that was all the reliance I had was what I could get information in the papers in regard to the standing of the bank. Q. State what information, if any, you had other than what was disclosed in the statements that were published. A. That is all the information I had. Then I knew some of the officers and I thought they were good business men. Q. You knew some of the directors? A. Yes, sir. Q. What ones? A. I knowed Walsh. Q. And did you know any of the others? A. I knowed two or three of them personally. I knowed Mr. Mosher and Outcalt and I knowed Mr. Stuart well. Q. And did you know who were the directors of the bank as shown by the advertisements and card? A. I knowed the balance by reputation. Q. Well, who were they? A. They had Stuart, Holmes, Mr. Thompson, Hamer, Phillips, Yates and Mr. Mosher and Outcalt was cashier. I have known him ever since he has been in the state. I did business with him when Sweet & Brock were running a business there. Q. You may state, Mr. Bailey, if you know anything about the condition of the bank except as was disclosed by the published statements?. You may state where you got your information as to the condition of the bank A. I got it out of the published statements. Q. And from any other source? A. No, sir, I had no other source to get it from. Q. You may state, Mr. Bailey, whether or not you would have deposited

your money and transacted your business there at this bank except upon the statements that you had seen and read. State what inducements were made and all of them that were made in order to induce you to transact your business with this bank? A. The inducement was that they would give me 1 per cent more than the First National Bank, and I thought it was just as good as where I had it, and I was getting more interest on my money. Q. Was that all that induced you to transact your business there, or was there any statements made? A. All the statements that was made I read in the papers. Q. Now, which did you rely upon, the—You may state what effect those published statements had upon your transacting business with the Capital National Bank, if any? A. Why, that is all the effect; all I had to go by was the published statement, supposing it to be true and correct. Q. Did you believe it to be true? A. I believed it to be true or I would not have put my money there. I would have kept it where it was. Q. How did you know now the reputation of these directors? A. Well, I had heard they was good men; I knowed some of them to be good business men. Q. Men of wealth and business sagacity? A. Men of wealth, yes sir.'

Kindly remember that this bank failed and closed its doors in fact on January 19th. On October 11th, just 100 days prior to the inducements offered to him as above shown to take his $10,000 out of the First National Bank and put the same in the Capital Bank. On December 28, just twenty two days prior to the collapse, he placed $2,000 more in this bank, believing it to be a safe place to put his money. We have shown by our briefs here on file that the Capital Bank was never solvent. That from the very day

it was organized as the Capital National Bank to the 19th day of January, A. D. 1893, it was a bankrupt. This occurred on October 11th, just 100 days prior to its closing its doors as a business house, a period from May, 1884 (Bill p. 61) to January 19th, 1893, every hour of which the managing officers of this bank had actual knowledge and every director and officer either well knew or ought to have known that said bank on October 11th, 1902, should not entrap Mr. Bailey into withdrawing his money from the First National Bank and place it where they knew it could never be repaid, did not plaintiffs in error thereby create the cause of action set forth in the amended petition, or did they create a cause of action in the Capital Bank, under federal law, or is it a cause of action personal to Mr. Bailey?

Can it be possible that it is law, justice or right that Mr. Bailey has by virtue of the "National Banking Act" lost his right to a personal action in a state court to recover this money, for so palpable fraud as this? That the old action at common-law for fraud and deceit is abolished in state courts; and the "National Banking Act" is an inhibition and prohibition on the very jurisdiction of state courts in actions of this kind?

Section 5239 (Rev. Stat. U. S.) is not alleged or set up by Thompson or by Yates and Hamer in their separate answers. In general terms it might be included in the right of the third parties alleged under the "Banking laws of the United States" and "The National Banking Act," and the "National Banking laws." They did not mention it in their motion for a new trial in the trial court (p. 43-49-50-51 and 52 Tr.), neither did they

claim any right under section 5239 now so earnestly set up in the brief of Mr. Thompson, nor did they mention it in their instructions to the jury, or in a petition in error in the Supreme court of the state. What they did claim was that defendants in error had or stated such a right in defendant error by the allegations of the petition.

In the case of King v. McLean, Asylum, 12 C. C. A. p. 139, the court held:

"A petition for habeas corpus which merely alleged that the petitioner is restrained in violation of the constitution and laws of the United States and is illegally imprisoned without due process of law, but does not set out in detail anything touched by the federal laws or constitution, does not state facts giving the circuit court jurisdiction."

Whittmore v. Bank, 134 U. S. 527; 10 Sup. Ct. 592, was an action commenced in the United States court for the District of NewHampshire by a stockholder for himself and such other as might join, against the directors, cashier and ex-director of a national bank to compel them to pay money lost to the bank by reason of their illegal conduct, charging them with doing acts **"in doing which the directors and officers violated their duties and obligations to the bank's stockholders, and their acts were in violation of the charter of the bank and the laws of the United States"** and it was claimed by counsel in that action, same as the one at bar, that the circuit court had jurisdiction under sections 5209 and 5239 of the revised statutes.

This court dismissed the bill for want of jurisdiction in the circuit court.

The syllabus is as follows:

"Under act of Congress July 12, 1882, providing that the

jurisdiction for suits by or against any association established under any law providing for national banking associations, except suits between them and the United States, shall be the same as the jurisdiction for suits by or against banks not organized under any law of the United States, the circuit court of the United States has no jurisdiction of a suit by a stockholder of a national bank against the bank and its officers and directors, all of whom are residents of the same state, to compel collection of a note due the bank, and payment to the bank by the directors of sums lost by reason of their illegal conduct.

"Nor is such jurisdiction conferred by Rev. Stat. of United States, 5209, prescribing punishment for embezzlement or wilfull misapplication of the funds or credits of a national banking association by its officers or directors; nor by 5239, providing for a suit by the Comptroller of the Currency to forfeit the franchises of national banks for the intentional violation by their directors of the law relating to national banks."

Neither did plaintiffs in error mention Sec. 5239 of the revised statutes of the United States in their instructions offered to the trial court, nor did they lay a proper foundation at the proper time and place in this action for any such right now so earnestly set up in the brief filed herein signed by Mr. Deweese and Mr. Bishop.

The ninth instruction printed on p. 5 of said brief was not offered by Mr. Thompson (p. 30 Record No. 230), but by defendants in error, and by Mr. Thompson duly excepted to. Certainly they cannot in this manner raise a federal question or build up a right or immunity to have this court review the same in this court. He must offer an instruction of his own and the court must refuse him some federal right mentioned therein. That part of the separate answer of Mr. Thompson, printed on pp.5 and 6 of his brief, does not set up, nor did Mr. Thompson at the trial claim a right

under section 5239 of Rev. Stat. U. S. The separate answer of Thompson simply alleges the names of the officers of the Capital Bank; that it was closed by the Comptroller; that no forfeiture of the franchise of the Bank has ever been declared; that the duties and obligations of the directors and stockholders of the bank were such and only such as required by the "National Banking Act," and a denial that he signed the reports **in manner as alleged in the amended petition.** * That the cause of action set out in the amended petition, if any, is founded on the alleged facts which, if true, constitute a violation of this defendant as a director or stockholder of his duties as laid down and defined in **the "National Banking Laws of the United States,"** to-wit:

"Concerning the government and management of National Banks. And this defendant alleges that if any liability attaches to him as a director or stockholder of said bank for any act done or duty neglected as set forth in the said amended petition or otherwise, that such liability is determined and controlled by the National Banking Act concerning the management of National Banks; and that in determining the liability of this defendant, there is necessarily involved the construction of said National Banking Act relating to the **duties of directors and stockholders of National Banks."**

But this is not claiming a federal right, privilege or immunity in Thompson. It is claiming one, if any, in the directors or stockholders of the several banks of the United States, or of its receiver, or in the defendants in error. It is not, was not a personal claim by Thompson of such a claim to the trial court. The trial court had no notice of any such claim on behalf of Mr. Thompson. At that time

he did not make the claims, or rely thereon, he now makes in his assignment of errors in his brief on pp. 14 to 16. The brief does not comply with the rules of this court and plainly refer to the record where he made such claim in the state courts and especially in the trial court. Take assignment No. 11 (p. 112, Record 230) as an illustration of the manner Thompson even in this court makes his assignment of error.

"* * * And the evidence adduced pertaining to the National Banking law by which and under which the acts and things complained of were done in violation of section 709 of the revised statutes of the United States."

We venture the assertion that Mr. Thompson, nor any of the plaintiffs in error, did not in this whole record assert or make claim to a single federal right, privilege or immunity as belonging to him to which he can now refer the court, that involves a right claimed by himself under section 709 of the revised statutes of the United States, nor did he by clear and direct claim specially assert such federal right under the "National Banking Act" unless the court will now hold that a general reference to the whole of the "National Banking Laws" is sufficient, and unless the court will hold that Mr. Thompson can set up a right in some third party and in some manner draw from the said third party's right such a right to himself.

But the assignments of error in the case at bar only relate to errors of the Supreme court of Nebraska, not to errors relating to some federal right properly set up or claimed in the trial court. We deem this very important, for in Miller v. Texas, 153 U. S. 538, Mr. Justice Brown said:

"And if the Fourteenth amendment limited the power of the states as to such rights as pertaining to citizens of the United States, we think it was fatal to this claim that it was not set up in the trial court. In Spies v. Illinois, 123 U S. 131, 181, objection was made that a certain letter was obtained from the deefndant by an unlawful seizure and the constitutional immunity was set up in the Supreme court of Illinois as well as in this court, but it was not made on the trial in the court of original jurisdiction. It was held, both by the Supreme court of Illinois and by this court, that the defense should have proven that the letter was unlawfully seized by the police and should then have opposed its admission upon the ground that it was obtained by such unlawful seizure. Said the chief justice: 'As the Supreme court of the state was reviewing the decision of the trial court it must appear that the claim was made in that court, because the Supreme court was only authorized to review the judgment for errors committed there and we can do no more. * * * If the right was not set up or claimed in the proper court below the judgment of the highest court of the state in the action is conclusive, so far as the right of review here is concerned.' So in Texas Pacific Railway v. Southern Pacific Co., 137 U. S. 48, it was held directly that a privilege or immunity under the constitution of the United States cannot be set up here under revised statutes (sec. 709) when suggested for the first time in a petition for rehearing after judgment. See also Caldwell v. Texas, 137 U. S. 692, 698."

Section 709 is not even mentioned in the answer, nor in any one of the numerous instructions offered by the defendant in error, or those offered by the court upon its own motion (27 to 36, record No. 230) nor in the instructions offered by Thompson (37 to 44 record No. 230) Section 5136 of the National Banking act is mentioned on p. 38, Record No. 230, which section relates principally to the creating of National Banks; **and this is the only particular reference made by Thompson or any other plaintiff in error** in the instructions to the jury, so that in all instructions

offered by all defendants not one of them specially claimed, set up, or then intended to rely upon a federal right, or bring his case to this court for final adjudication of such a right. Again it should be remembered that separate answers were filed by each defendant. No joint answer of a plaintiff in error, now in this court, was filed save and except Yates and Hamer (21-24, Record No. 230). Each defendant, now plaintiffs in error, stood squarely on his personal and individual right, and yet only in a few instances, and in no instance did any one defendant (37 to 44, Record No. 230) request the trial court to instruct the jury as to his separate federal right, privilege or immunity, under his answer, and not a single defendant requested a separate instruction setting up or claiming a federal right under any federal statute or any federal law, not even the "National Banking Act," and we here assert in the very language of many opinions in this court that:

"* * * It must appear that the claim was made in the court of original jurisdiction, because the Supreme court was only authorized to review the judgment for errors committed there, and we can do no more, and if the right was not set up or claimed **in the proper court below**, the judgment of the highest court of the state in the action is conclusive so far as the right to review here is concerned."

It is the law of Nebraska, well settled by a long line of decisions that the Supreme court can only review the errors alleged in the motion for a new trial and if no motion for a new trial is made within three days of the verdict all errors are waived. And it should be remembered that the only jurisdiction the Supreme court of Nebraska had in this action was to review the errors alleged in the motion for

a new trial and in turn alleged in a petition in error fifiled in the Supreme court.

Sec. 314, Code Civil Procedure Nebraska.

Sec. 315, Code Civil Procedure Nebraska.

McDonald v. McAllister, 32 Nebr. 514.

Nebraska Nat'l Bank v. Pennock, 59 Nebr. 61.

Sec. 584,Code Civil Procedure Nebraska.

Courtnay v. Price, 12 Nebr. 182.

R. V. R. R. Co. v. Mayes, 13 Nebr. 491.

Singer v. Doggett, 16 Nebr. 609.

Dunham v. Courtney, 24 Nebr. 629.

Cunningham v. Tonnemaker, 13 Nebr. 462.

Weir v. B. & M. R. R. Co., 19 Nebr. 215.

Moore v. McCallum, 43 Nebr. 617.

The mere reference to a federal right claimed by defendants in the first paragraph of the motion for a neew trial (p. 49, Record No. 230) which only relates to the rremoval of the cause to the federal court, which alleged eerror, if any there was, plaintiff in error now waives, and ddoes not urge said error to this court.

The third error alleged in the motion (p. 50, Reccord No. 230) that if any damage existed as alleged in the petition "could only be recovered by the bank or by the rreceiver, and ratably distributed among all the creditors anad stockholders of said bank and could not be recovered by plaintiff for itself individually," is not material here for wwe have shown that this is no more or less than setting up aa federal right, in either one of four parties named, entirelyy outside

of this action, namely: First, the bank; second, the receiver of the bank; third, the stockholders; fourth, the creditors of the bank, and such federal right if one really existed in favor of said four parties, can give this court no jurisdiction in favor of plaintiffs in error.

The only remaining error alleged in said motion for a new trial that makes any reference to a federal law, is the fourth paragraph thereof:

"4th. The court erred in taking jurisdiction of said case and the hearing of the proof under the allegations of the plaintiff's petition over the objection of this defendant for the reason that the duties and liabilities of this defendant as a director of the Capital National Bank are governed and controlled by the National Banking Act, under which said bank was organized and for which this defendant was acting in the capacity of a director, and the damages growing out of the mismanagement, negligence or fraud of this defendant, as charged in said petition, if the same existed, would not accrue to this plaintiff, but would be governed and controlled by the law governing the management of the said bank under the National Banking Act and the liabilities of said defendant under said act as a director of said bank."

This objection is very general in its scope and gives the triel court no notice of what the specific error alleged is, and would require the trial court to stop proceedings in his court and take the time to examine the whole "National Banking Act" and every law that the Congress of another nation has passed relative to the negligence or fraud and the liabilities of directors of National Banks. This is too general even under the state law.

But defendants in the motion urged that these damages would not accrue to plaintiffs, but to one or all of the four parties just named. That is the cause of action, if any exists, in favor of said four parties, or one of them. Therefore, plaintiff had no cause of action, and because one of

these four parties had the right to such damages under the federal law, and such federal right existed in them, and therefore this court now has jurisdiction to so determine. Not that any right can be granted defendants in the motion. Only a right can be determined that belongs to one of these four parties and in this manner this court can acquire jurisdiction. But the last few words do say "the liability of defendant under said act as director of said bank." But such a closing to a whole paragraph in a motion for a new trial, referring in the most general terms both to his "liability" and to a whole "National Banking Act," not whereby or wherein, or in what manner the liability so generally expressed was controlled, when all of the damages, as alleged in the motion for a new trial must go and belonged to one of said four parties, shows clearly that this part of the motion for a new trial is clearly insufficient.

The four paragraphs, first, second, third and fourth, are the only ones in the whole motion for a new trial that make a reference to a federal right, privilege or immunity in either one of the plaintiffs in error, and it is clear that a federal right belonging to any one of them, save and except the claim of removal of the action to the circuit court, were not properly, clearly and specifically raised at the proper time and in the proper way.

But this is not all. The case of Schuyler National Bank v. Bollong, 150 U. S. 85, is quite in point. Bolling brought a suit in a state court of Nebraska against the bank squarely under the statutes of the United States and squarely under a particular section of the "National Banking Act.' The bank, by motion, denied the jurisdiction to try the case and alleged "that exclusive jurisdicition is

by the laws of the United States, to-wit: section 711 of the revised statutes of the United States, vested in the courts of the United States to try and determine the above entitled action."

The whole proceedings in said action at large appears at pp. 85, 86 and 87, and the bank in that case made precisely the same attempt and allegations of record that plaintiffs in error have in the case at bar, but in the opinion it is among other things said:

"But by the requirements to the exercise of our jurisdiction of section 709 of the revised statutes, the title, right, privilege, or immunity thus relied on must be specially set up or claimed in the state court at the proper time and in the proper way. The decision must be against the title, right, privilege, or immunity so set up or claimed. Spies v. Illinois, 123 U. S. 131; Brooks v. Missouri, 124 U. S. 394; Chappell v. Bradshaw, 128 U. S. 132; Texas & Pacific Railway v. Southern Pacific Co., 137 U. S. 48. Yet it is urged that the bank had contended at every stage of the litigation **that the trial court had no power to proceed to judgment against it under sections 5197 and 5198, because of the want of averment in the petition of facts essential to give such jurisdiction, and hence that the bank must be held to have specially set up or claimed the title, right, privilege, or immunity under said sections to be exempt from liability to the plaintiff below for any matter or thing alleged in his complaint.** But we are unable to accede to this view. The case was necessarily tried in accordance with the procedure and practice prescribed by the Code of Civil Procedure of Nebraska. That provided a form of action to be called a civil action, and to be commenced by the filing of a petition and the issue of summons thereon; what the petition must contain; that the pleadings should be liberally construed; that redundant matter might be stricken out and the allegations of a pleading required to be made definite and certain by amendment when necessary; that neither presumptions of law nor matters of which judicial notice is taken need be stated in the pleading; that amendments

in furtherance of justice might be made before or after judgment; that the court should disregard errors or defects in the pleadings or proceedings not affecting the substantial rights of the adverse party, and that by reason of such error or defect no judgment should be reversed or affected; for the assignment of grounds for a new trial, including that the verdict, report, or decision was not sustained by sufficient evidence, or was contrary to law, and for error of law occurring at the trial and excepted to. Par. 2, 62; 92; 121; 125; 136; 144; 145; 314; Comp. Stat. Neb. 1887, pp. 741, 748, 753, 756, 758, 759, 779.

"The questions raised upon the pleadings were disposed of by the Supreme court in accordance with these provisions and the jurisprudence of the state in that regard, and there is nothing whatever to indicate that in passing upon the technical sufficiency of the complaint its attention was invited to the proposition that by its judgment thereon it might be depriving the defendant below of some title, right, privilege, or immunity arising in virtue of the sections under which the liability accrued."

In Eustise v. Bolles, 150 U. S. 362, this court says:

"To give this court jurisdiction of a writ of error to a state court it must appear affirmatively not only that a federal question was presented for decision by the state court, but that its decision was necessary to the determination of the cause, and that it was decided adversely to the party claiming a right under the federal laws or constittuion, or that the judgment as rendered could not have been given without deciding it.

"Where the record discloses that, if a question has been raised and decided adversely to a party claiming the benefit of a provision of the constitution or laws of the United States, against such party, and the decision of the latter question is sufficient, notwithstanding the federal question, to sustain the judgment, this court will not review the judgment.

"When this court, in a case brought here by writ of error to a state court, finds it unnecessary to decide any federal question, its logical course is to dismiss the writ of error."

See also Baldwin v. Kansas, 129 U. S. 52.

Brown v. Mass., 144 U. S. 573-580.

And in Chappell v. Bradshaw, 128 U. S. 134, the court says:

"As the Supreme court of the state was reviewing the decision of the trial court, it must appear that the claim was made in that court, because the Supreme court was only authorized to review the judgment for errors committed there, and we can do no more" Tested by this well settled rule it is apparent that this writ of error cannot be maintained, as it is conceded that the plaintiff in error did not set up or claim in the trial court the limitation, the benefit of which he now insists should have been accorded him.

In Brooks v. Missouri, 124 U. S. 394, 400, all through the opinion it is held, that in order to give this court jurisdiction the plaintiffs in error must have laid a proper foundation "at the proper time and in the proper way" and as the Supreme court of Nebraska was reviewing the decision of the trial court, it must appear that the right, title, privilege or immunity was made in the trial court. On p. 399 the general objection was made that a statute of the state was in "violation of * * * the constitution of the United States, nor shall any state deprive any person of life, liberty or property without due process of law nor deny any person within its jurisdiction the equal protection of the laws," but the state court held the statute valid and on p. 400 this court in the opinion says:

"It thus appears that, while upholding the statute, the court also put its decision on another ground which was equally conclusive against the defendant, to-wit, that even if the trial court could, in its discretion, allow the additional reason for a new trial to be presented after the expiration of the four days, there had been no such abuse of that dis-

cretion in this case as would justify a reversal of the judgment on that account. That part of the decision is certainly not repugnant to any provision of the constitution or laws of the United States, and it is of itself conclusive. It was fairly presented and necessarily involved in the case. It disposed of the supposed constitutional question presented in the argument without a direct decision, upon a ground which cannot be reviewed by us, and which was not evasive merely, but real. Chouteau v. Gibson, 111 U. S. 200; Adams County v. Burlington & Missouri Railroad, 112 U. S. 123, 125, 127; Chapman v. Goodnow, 123 U. S. 540, 548. Such being the case, the decision of the alleged federal question was not necessary to the judgment rendered and consequently is not sufficient to give us jurisdiction. Murdock v. Memphis, 20 Wall. 590, 636."

In Morrison v. Watson, 154 U. S. 115, the court says:

"If it was not claimed in the trial court, and therefore, by the law and practice of the state, as declared by its highest court, could not be considered by that court; or if it was not claimed in any form before judgment in the highest court of the state; it cannot be asserted in this court. Rev. Stat., see 709; Spies v. Illinois, 123 U. S. 131, 181; Schuyler 153 U. S. 535."

Third Point.

The second defense set up a certain action commenced in the district court of Lancaster county by one Thomas Bailey v. Charles W. Mosher et al. See Bill Exceptions 253-274. While the present action was commenced in the district court of Seward county. On pp. 256, 258 and 270 of the bill all the names of parties to that suit appear in full. Neither David E. Thompson or the Jones National Bank were parties plaintiff or defendant in said action, and plaintiff in error cannot base a federal right belonging to him, and how Mr. Thompson can claim a federal right upon this judgment, as against the Jones National Bank,

is beyond our comprehension. He did not even assign this as error and is therefore concluded (Record No. 230, 101 to 104). But still that is not enough:

"The fact that a suit is brought to recover the amount of a judgment of a court of the United States does not, of itself, make it a suit arising under the constitution and laws of the United States."

Metcalf v. Watertown, 128 U. S. 587.

See large number cases cited under this case in Russell and Winslow syllabus digest, p. 2620.

The cause of action set up in the amended petition by Thomas Bailey (p. 7, Record No. 232) is not like the petition set up in the plea in bar. This is clearly shown by the opinion of Shiras, J., in Bailey v. Mosher et al., 74 Fed. 125, and by Thayer, J., in 107 Fed. 561. If the cause of action in the first petition was one in, and belonged to the receiver of the bank, and the cause of action in the petition at bar is one for damages for fraud and deceit at common-law, then there is nothing in the plea in bar because both petitions are not for personal damages caused, and belonging to Thomas Bailey, and if this court should adopt the same construction placed upon the petition at bar as placed thereon by Shiras, J., Thayer, J., and the state courts, in this record, then the motions to dismiss or affirm filed in each of these several cases should be sustained.

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